(22,338)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 144.

BROOKLYN MINING AND MILLING COMPANY, APPELLANT,

vs.

CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER No. 2, AND GEORGE MILLER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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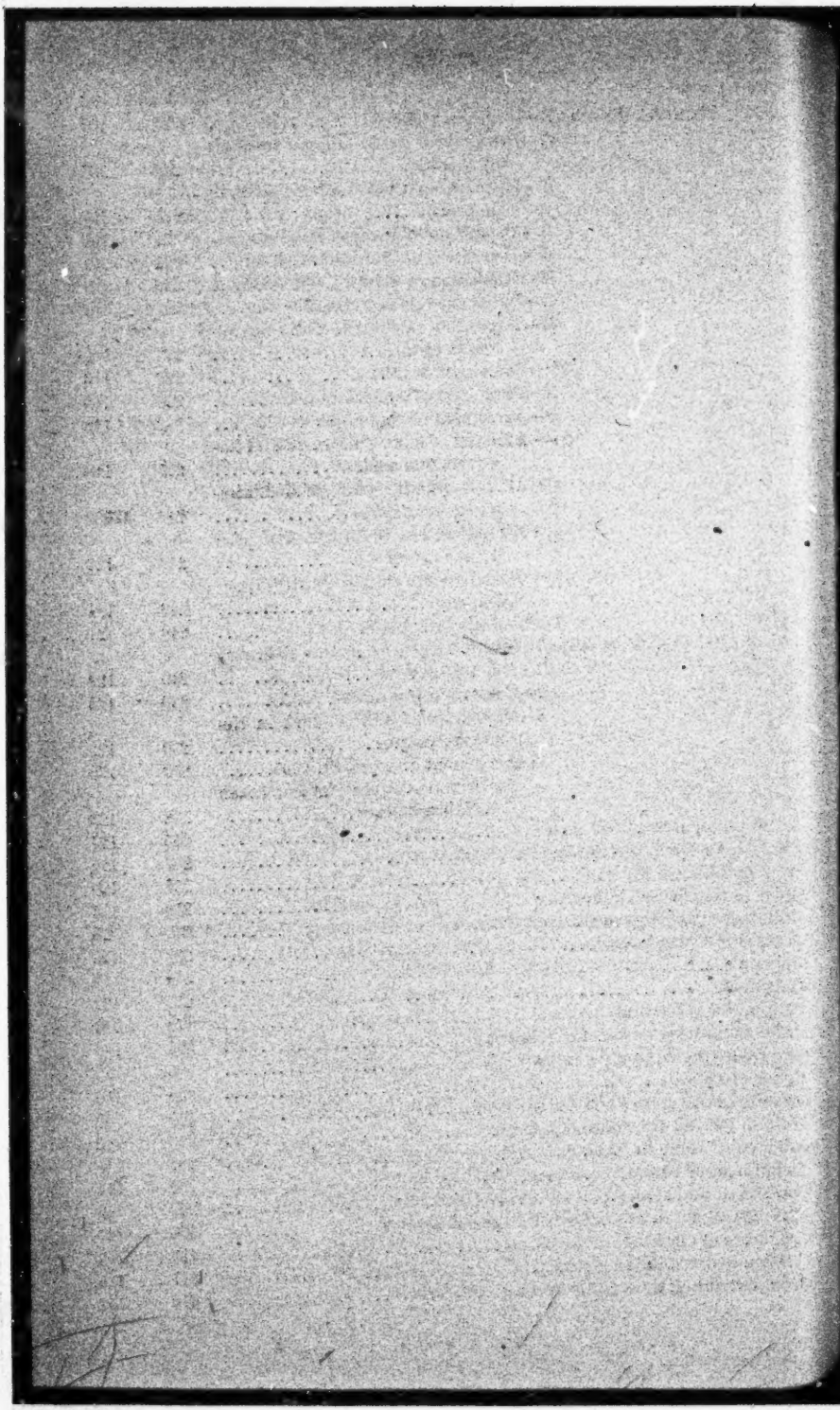

a In the Supreme Court of the Territory of Arizona.

No. 1135.

BROOKLYN MINING AND MILLING COMPANY, a Corporation, Appellant,

vs.

CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER, No. 2, and GEORGE MILLER, Appellees.

On Appeal from the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

F. S. Howell, Esq., Jno. J. Hawkins, Esq., and Thomas C. Job, Esq., attorneys for appellant.

Messrs. Norris & Ross and Reese M. Ling, Esq., attorneys for appellees.

Be it remembered that on to-wit: the eleventh day of November, 1909, came the appellant in the above entitled cause, by its attorneys, F. S. Howell, Jno. J. Hawkins and Thomas C. Job, and filed in the clerk's office of said court, in said entitled cause, a certain Abstract of Record in words and figures following, to-wit:

1 *Pleadings upon Which the Issues Were Tried.*

In the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai.

BROOKLYN MINING AND MILLING COMPANY, a Corporation, Plaintiff,

vs.

CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER, and GEORGE MILLER, Defendants.

Complaint.

Plaintiff complaining of defendants alleges:

I.

That plaintiff now is and at all the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the Territory of Arizona;

That on or about the — day of December, 1907, at Yavapai County, Arizona, Alonzo V. Miller, one of the signers of a written contract hereinafter set forth, who signs "A. V. Miller," died intestate, leaving him surviving the above named defendants Ada

2 M. Miller his widow, and Charles C. Miller, hereinafter referred to for identification as Charles C. Miller No. 2, and George Miller, a minor under the age of twenty-one years, his children;

That the defendants Charles C. Miller and George Miller are residents of Yavapai County, Arizona; that defendants George B. Lasbury and Ada M. Miller are non-residents of the Territory of Arizona and are residents of the City of Omaha, Nebraska, and defendant Charles C. Miller No. 2 is a non-resident of the Territory of Arizona, and in some manner connected with the United States Navy, stationed upon one of the vessels of said Navy now in foreign waters;

That no administrator has been appointed of the estate of said deceased.

II.

On or about the 27th day of August, 1907, defendants Charles C. Miller and George B. Lasbury and the deceased Alonzo V. Miller claimed to have some rights, titles and interests in some manner in and to what are now and were then known as the "West Brooklyn," "East Brooklyn," "South Brooklyn," "North Brooklyn," "Empress" and "Midway" mining claims situate in Big Bug mining district, Yavapai County Arizona, notices of location whereof were and are of record in the office of the County Recorder of said county in
3 Books of Mines as follows: "West Brooklyn," Book 67, Page 408; "East Brooklyn," Book 67, Page 407; "South Brooklyn," Book 67, Page 406; "North Brooklyn," Book 78, Page 267; "Midway," Book 78, Page 265; "Empress," Book 78, Page 266; and concerning which or some of said claims certain litigation was then pending in this Court. That on or about said August 27, 1907, a contract in writing was entered into by and between the plaintiff herein on the one part, and the above named defendants Charles C. Miller and George B. Lasbury and the said Alonzo V. Miller, deceased, on the other part, which contract was in the words and figures following, to-wit:

"Whereas, An action is now pending in the District Court of Yavapai County, Arizona, entitled Brooklyn Mining & Milling Company et al., vs. Charles C. Miller, Alonzo V. Miller and George B. Lasbury, which action relates to the title to the West Brooklyn, East Brooklyn and South Brooklyn mining claims located in said county and territory, and relates to an accounting for ores and minerals taken therefrom and

Whereas, The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury have made a conditional sale of the above named West Brooklyn Mining Claim for the sum of ten thousand dollars to the United Verde Copper Company, and

Whereas, An action is pending in the District Court of
4 Yavapai county, Arizona, entitled Charles C. Miller vs. Brooklyn Mining & Milling Company for several thousand dollars claimed to be due and owing to the said Charles C. Miller for services performed by him and Alonzo V. Miller for the said Brooklyn Mining & Milling Company, and

Whereas, It is the desire of the parties connected with the foregoing causes of action to settle same and to adjust the matters of difference between said parties in connection therewith:

Therefore, In consideration of the dismissal and settlement of the foregoing causes of action it is hereby stipulated and agreed by and between the Brooklyn Mining & Milling Company and Charles C. Miller, Alonzo V. Miller and George B. Lasbury that if the sale of the West Brooklyn Mining Claim to the said United Verde Copper Company is consummated on or before the first day of January, 1908, the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to transfer and deliver to the said Brooklyn Mining & Milling Company one hundred seventy-five thousand shares (175,000) of stock in said Brooklyn Mining & Milling Company, free and clear of all liens or incumbrance whatsoever; it being understood that said transfer of stock is to include all of the holdings of the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury in the Brooklyn Mining & Milling Company, and the said
5 parties are to receive therefor the sum of 3 (Three) cents per share for said stock; and in addition thereto Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to pay to the Brooklyn Mining & Milling Company the sum of eight thousand five hundred dollars ($8,500.00) out of the proceeds derived from the sale of the said West Brooklyn mining claim; in addition thereto the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey all of their right, title and interest in and to the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and said transfers shall contain the warranty that the assessment work has been done for the year 1907 upon the Empress, Midway and North Brooklyn and the said Brooklyn Mining & Milling Company shall pay the said assessment work at its reasonable value. The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury agree to do the assessment work for the year 1907, on the East and South Brooklyn mining claims, and said assessment work so to be performed is to be paid for by the Brooklyn Mining & Milling Company at its reasonable value. It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury shall not be consummated on or before the first day of January, 1908, then the said Charles C. Miller, Alonzo V. Miller and George
6 B. Lasbury are to convey to the Brooklyn Mining & Milling Company all of their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value.

It is understood by and between the parties hereto that the foregoing does not concede or admit any of the allegations contained in the pleadings of said causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties and avoiding further costs and expenses to the parties hereto.

In witness whereof, we have hereunto set our hands this 27th day of August A. D. 1907.

C. C. MILLER.
A. V. MILLER.
G. B. LASBURY.
BROOKLYN MINING & MILLING COMPANY,
By CHAS. W. PEARSALL, *President.*"

Which said contract was entered into for the purposes therein stated and in consideration of the doing of the things in said contract provided as therein set forth, and for other considerations.

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III.

At and before the time said contract was entered into and executed the said Charles C. Miller, George B. Lasbury and Alonzo V. Miller represented to plaintiffs that they had entered into a contract with the United Verde Copper Company, which said United Verde Copper Company was then possessed of several millions of dollars of capital and extensive mining and smelting interests, machinery, buildings, and plants, in and in the vicinity of said county and elsewhere by the terms of which contract the said United Verde Copper Company had an option or conditional contract in writing to purchase from said parties the said West Brooklyn mining claim, said contract of conditional purchase or option being the one referred to in said written contract between this plaintiff and said other named parties hereinabove set forth. At said time the plaintiffs denied the right of defendants Charles C. Miller, Alonzo V. Miller and George B. Lasbury to sell said West Brooklyn claim, and denied that the said defendants had any right, title or interest therein as owners of the said claim, and as one of the considerations for entering into said contract to which plaintiff Brooklyn Mining & Milling Company was a party, and as one of the inducements to the execution of said contract and for the pur-

8 pose of permitting said conditional contract of purchase to be consummated by said United Verde Copper Company, it was understood and represented and was a well known belief by said defendants the Millers and Lasbury, and the plaintiffs that if said United Verde Copper Company should become the owner of said West Brooklyn claim that fact taken in connection with the fact that said United Verde Copper Company would most likely improve, develop and explore said claim, the value of the claims owned by plaintiff Brooklyn Mining & Milling Company, to-wit: Brooklyn, North Brooklyn, East Brooklyn, South Brooklyn, Empress, and Midway claims which adjoin said West Brooklyn claim, would be materially and greatly enhanced to the plaintiff Brooklyn Mining & Milling Company, and also by reason thereof the value of the capital stock of the plaintiff company would be greatly increased and enhanced.

IV.

The sale of the West Brooklyn claim to said United Verde Copper Company, referred to in the contract hereinabove set forth, was not consummated on or before January 1, 1908, nor have any of the covenants and obligations referred to in said contract to be performed, on condition of the consummation of such sale to the United Verde Copper Company on or before January 1, 1908, ever been performed, nor was it the purpose or attention of any
9 of the parties to said contract that any of said covenants and conditions should be performed, except in the event of the consummation of such sale therein referred to, to said United Verde Copper Company. By reason of the fact that said sale was not consummated according to the terms of said contract, the plaintiff avers that so much of said contract as depended upon the consummation of said sale has become obsolete and has been rescinded, and is of no further force or effect, by virtue of the stipulations in said contract provided.

V.

Plaintiffs aver that the portion of the contract which they now seek to enforce, including the preamble and down to the word "Therefore," and excluding that portion commencing with the words "Therefore, in consideration of the dismissal," etc., and ending with the words "Brooklyn Mining & Milling Company at its reasonable value," is as follows:

"It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury shall not be consummated on or before the first day of January, 1908, then the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to con-
10 vey to the Brooklyn Mining & Milling Company all of their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value.

It is understood by and between the parties hereto that the foregoing does not concede or admit any of the allegations contained in the pleadings of said causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties and avoiding further costs and expenses to the parties hereto."

VI.

Plaintiff says that said Alonzo V. Miller, deceased, and the defendants Charles C. Miller, George B. Lasbury, Ada M. Miller, Charles C. Miller No. 2 and George Miller, have failed and refused,

each and all of them, to convey to the plaintiff all or any of their right, title or interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and the said defendants now refuse to perform the provisions of said contract which plaintiff now seeks to enforce.

VII.

That the suits and actions mentioned in the said contract
11 have heretofore been dismissed, and the plaintiff has performed all of the provisions of said contract which were required by it in and by said contract to be performed as conditions precedent to its right to receive a conveyance of said West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and has offered, and now hereby offers to pay for the assessment work on the North Brooklyn, Empress and Midway mining claims, for the year 1907 at its fair and reasonable value, and the plaintiff has at all times since January 1, 1908, stood, and now does stand ready and willing and offers to perform each and all of the covenants, agreements and obligations of said contract which became operative on the failure of the United Verde Copper Company to purchase said West Brooklyn mining claim on or before January 1, 1908, whereseever found and stated to be by it performed according to the terms and conditions of said contract.

VIII.

Plaintiffs aver upon information and belief obtained from the defendants, that prior to the death of said Alonzo V. Miller, the said Alonzo V. Miller executed and delivered a deed of conveyance to the said Ada V. Miller of all of his right, title and interest in and
to each and all of the mining claims hereinbefore named,
12 and transferred and assigned to her said 175,000 shares of stock, and upon such information and belief, plaintiffs aver that at the present time and ever since the execution of said deed by said deceased to said Ada M. Miller, the latter is and was the owner of such right, title and interest in and to said mining claims and stock as said Alonzo V. Miller owned and possessed when said deed was executed as aforesaid, and that she held and holds the same subject to said compromise contract hereinabove set forth.

Plaintiffs further aver, however, that if they have been misinformed as to said conveyance and transfer from said deceased to his said wife, then in that event defendants Ada M. Miller, Charles C. Miller No. 2 and George Miller, as the sole and only heirs at law of said deceased, take by operation of law all of the interest, right and title in and to said mining claims which the said deceased owned and possessed at the time of his death.

IX.

Plaintiffs aver in connection with that paragraph of the contract which requires the plaintiff Brooklyn Mining & Milling Company

to pay the fair and reasonable value for doing assessment work on the North Brooklyn, Empress and Midway mining claims for the year 1907, that the said company and defendants George B.
13 Lasbury, Charles C. Miller and Alon-o V. Miller, now deceased, agreed prior to the death of the latter that that portion of the contract might be considered as fulfilled upon the payment of the sum of One hundred and fifty dollars ($150.00), and that as between plaintiff company and said defendants and said Alonzo V. Miller, the payment by the said plaintiff Company to the defendants and said Alonzo V. Miller of the sum of $150.00 would be a compliance with that provision of said contract.

X.

Ever since said August 27, 1907, down to the time of the death of said Alonzo V. Miller, the said Charles C. Miller, George B. Lasbury and Alonzo V. Miller, and since the death of the latter all of the aforesaid persons except said Alonzo V. Miller, together with the other defendants hereinabove named, Ada M. Miller, Charles C. Miller No. 2, and George Miller, have been mining and shipping silica and ores from said West Brooklyn mining claim in large quantities, amounting in the aggregate to many thousands of tons, and have sold the same to the United Verde Copper Company and The Arizona Smelting Company, and the above named defendants are now mining, shipping and selling silica and ores from said West Brooklyn claim; all of which is and was contrary to the spirit, purpose and intent of the contract hereinabove set forth be-
14 tween plaintiff Company and the defendants Lasbury and Charles C. Miller and the said Alonzo V. Miller. That the proceeds from the sale of said silica have amounted to large and considerable sums of money which have been received by said defendants, and said Alon-o V. Miller (now deceased), and have been converted to their own uses and used and appropriated for their own benefit, and that none of such proceeds have been received by plaintiff, or by any person for its benefit, although the plaintiff is and has been entitled to receive such proceeds from the time said contract was entered into; that silica is now continually being mined, shipped and sold in large quantities from said West Brooklyn mining claim by the defendants, and the value thereof is being constantly diminished thereby, all of which is and was a trespass upon the rights of plaintiff Company; and plaintiff further alleges that the mining and removal of silica from said claim constitutes and is a great and irreparable injury thereto, and tends to and does decrease and depreciate the value of said West Brooklyn mining claim. Plaintiff does not know and has no accurate or definite means of knowing or of ascertaining the extent and amount of silica so shipped, or the value thereof, or the amount received from the sale thereof by defendants as aforesaid, in any other way than from the defendants in this action; and plaintiff alleges that
15 it has no plain, speedy and adequate remedy at law for the trespass committed by said defendants and said Alonzo V.

Miller; that the acts concerning which injunctive relief is sought are being committed at this time, and that irreparable mischief and injury will result to plaintiff if notice of this application for injunction be given, and the case is too urgent to admit of the delay incident to giving notice to defendants, and plaintiffs can be protected and their rights preserved, and the value and integrity of said West Brooklyn claim can be protected and preserved, only by the order of this Court restraining defendants and all of them from the commission of the acts herein complained of.

XI.

Plaintiff alleges that by reason of the premises and the failure of the consummation of the sale of said West Brooklyn mining claim to the United Verde Copper Company on or before January 1, 1908, as in the aforesaid contract provided, the plaintiff Brooklyn Mining & Milling Company is entitled to have and receive of and from the above named defendants a good and sufficient deed of conveyance conveying to said Company all of the right, title and interest of the aforesaid persons, and the interest of said Alonzo V. Miller at the time of his death, in and to the West Brooklyn,
East Brooklyn, South Brooklyn, North Brooklyn, Empress
16 and Midway mining claims as provided and stipulated in
said contract, all of which has been demanded by plaintiff and compliance therewith has been refused by defendants.

Wherefore, plaintiff prays:

(1) That the Court by its order forthwith appoint some suitable person to act as special guardian or guardian ad litem in this action for the above named minor defendant, George Miller, for the purpose of protecting the interest of such minor herein.

(2) That the defendants and each of them be required by the judgment and decree of this Court to convey to the Brooklyn Mining & Milling Company, the plaintiff herein, all of their and each of their, separate interests which they own or claim to own in their own right, or which any of them own or claim to own as sole heirs of Alonzo V. Miller, deceased, or as the widow or grantee of said deceased, and all right, title and interest which they may own or claim to own as of the time of August 27, 1907, and subsequent thereto, which either Charles C. Miller, George B. Lasbury, defendants, or Alonzo V. Miller, deceased, had in and to said premises at the time of executing the contract set forth in this complaint dated August 27, 1907, and that in default thereof a Commissioner be appointed by the Court to make conveyance of such of said interests as the parties themselves do not convey; and that it be
17 further decreed that until such conveyances are made the
said defendants hold the legal titles of said claims, and all of them, in trust for the use and benefit of plaintiff.

(3) That the defendants Charles C. Miller, George B. Lasbury, Ada M. Miller, Charles C. Miller No. 2, and George Miller, and their counsellors, solicitors, attorneys, agents, servants and employés, be enjoined and restrained until the rendition of final decree herein

from mining, selling, shipping, or disposing of in any manner any of the ores, minerals and silica situate and located upon or in any of the mining claims hereinabove described, and particularly upon or in the West Brooklyn mining claim, and from receiving from any persons or corporations any sums of money in payment for any ores, minerals or silica mined or taken from said claims, or any of them.

(4) That the title to said West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims be forever quieted and established in the plaintiff Brooklyn Mining and Milling Company, and that defendants Charles C. Miller, George B. Lasbury, Ada M. Miller, Charles C. Miller No. 2, and George Miller, be forever enjoined and restrained from claiming oh having any right, title or interest therein or thereto.

(5) That the defendants herein, and all of them, be re-
18 quired to account for all sums received by them, or any of them, and the said Alonzo V. Miller, deceased, for all ores, minerals and silica taken, removed and mined from said West Brooklyn mining claim between said August 27, 1907, down to the time of the rendition of final decree herein, by the said defendants or the said Alonzo V. Miller. That the Court determine and find the value of the ores, minerals and silica so mined and sold by defendants and Alonzo V. Miller, or any of them, during all of the aforesaid period, and that it adjudge and decree that plaintiff Brooklyn Mining & Milling Company is entitled to have and receive of and from them the value of all such ores, minerals and silica so mined, shipped and sold as aforesaid, and that plaintiff have judgment against defendants herein for the value of all such silica, ores and minerals.

(6) That the fair and reasonable value of the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907, be by this Court ascertained and decreed, but not to exceed the sum of One hundred and fifty dollars ($150.00), and that the plaintiff herein may be permitted to pay the same into Court, for the use and benefit of the defendants and their successors and assigns, under the contract of August 27, 1907, set forth in this complaint.

(7) That plaintiff have such other, further and different relief in the premises as to the Court may seem just and equitable,
19 and to recover its costs herein incurred and expended.

(Signed) JNO. J. HAWKINS,
THOMAS C. JOB,
Attorneys for Plaintiff.

TERRITORY OF ARIZONA,
County of Yavapai, ss:

Charles W. Pearsall, being duly sworn, on his oath says:

That he is the president of the plaintiff Brooklyn Mining & Milling Company, and makes this affidavit in its behalf:

That he has read the above and foregoing complaint and knows the contents thereof, and that the allegations therein are true in

substance and in fact and of his own knowledge except the matters therein stated on information and belief, and that as to those matters he believes it to be true.

CHARLES W. PEARSALL.

Subscribed and sworn to before me this 18th day of February, A. D. 1908.

My commission expires June 18th, 1911.

(Signed) THOMAS C. JOB,
[SEAL.] *Notary Public.*

(Endorsed: Filed February 18th, 1908.)

20 *Amended Answer and Cross-Complaint.*

[Title of Court and Cause.]

Comes now Charles C. Miller, Ada M. Miller, Charles C. Miller No. 2, and Charles C. Miller No. 2, as guardian ad litem of George Miller, a minor, defendants herein, and answering said complaint plead in abatement of this action as follows:

I.

That prior to the first day of January, 1908, defendant Charles C. Miller in open court dismissed his action against plaintiff herein as required by the contract set out in the complaint and demanded of plaintiff the dismissal of its suit against these defendants and others, as required by said contract; that plaintiff declined and refused to dismiss said action.

That thereafter on the 2nd day of January, A. D. 1908, (the first day of January being a legal holiday, to-wit, New Year's Day), these defendants and their co-defendants tendered to plaintiff in open court in an action then pending in this court between plaintiff and defendants herein, said action being the one referred to in the first paragraph of said contract of August 27, 1907, proper certificates for one hundred and seventy-five — (175,000) shares of the capital stock of plaintiff company duly endorsed in blank
21 and witnessed for delivery and transfer;

Also Three Thousand One Hundred and Fifty ($3,150.00) Dollars, lawful money of the United States;

Also a valid and sufficient deed properly executed and acknowledged by defendants Charles C. Miller, Alonzo V. Miller and George B. Lasbury transferring to plaintiff the South Brooklyn, East Brooklyn, North Brooklyn, Midway and Empress mining claims mentioned in plaintiff's complaint, said deed having been so executed and acknowledged by Alonzo V. Miller prior to his death and delivered by him for the purpose of complying with said agreement of August 27, 1907, and containing a warranty that the assessment work had been done upon said claims and each of them, for the year 1907;

Also a duly recorded affidavit showing that the assessment work upon said claims for the year 1907 had been done as required by law, and by said contract of August 27, 1907.

That such tender was in full compliance with all of the requirements of said agreement of August 27, 1907, on the part of the defendants herein, or of Alonzo V. Miller, deceased, to be performed. That at the time of the making of such tender plaintiff was requested in open court to dismiss said action mentioned in the first paragraph of the agreement of August 27, 1907, but
22 declined and refused to do so, or to perform any of the conditions and requirements of said contract.

That the tender above described has been renewed from time to time since the said second day of January, 1908, but plaintiff has uniformly declined and refused to receive the same, or to perform or carry out its stipulations and covenants set forth in said agreement of August 27, 1907; that at all times since the second day of January, 1908, these defendants have been ready and willing to deliver to plaintiff the stock, money, deed and affidavit above mentioned, and hereby offer to deliver to plaintiff said stock, deed and affidavit, together with the sum of Three Thousand Two Hundred and Fifty ($3,250.00) Dollars, lawful money of the United States, less the reasonable value of the assessment work for the year 1907, upon the Empress, Midway, North Brooklyn, East Brooklyn and South Brooklyn mining claims to be determined by this Court.

Wherefore, these defendants pray that plaintiff take nothing by this action, that the same be abated by order of this court, and for their costs herein expended.

(Signed) REESE M. LING,
NORRIS & ROSS,
Attorneys for Said Defendants.

Further answering said complaint these defendants demur
23 thereto, and for grounds of demurrer allege:

I.

That said complainant does not state facts sufficient to constitute a cause of action against these defendants or any of them.

II.

That said complaint is insufficient for want of equity.

III.

That it appears upon the face of said complaint that plaintiff has a speedy, adequate and complete remedy at law for the alleged wrongs therein complained of.

Whereof, defendants pray that plaintiff take nothing by its action and that they have judgment for their costs herein expended.

(Signed) REESE M. LING,
NORRIS & ROSS,
Attorneys for Said Defendants.

Further answering plaintiff's complaint, defendants admit the corporate character of plaintiff, admit that during the month of December, 1907, Alonzo V. Miller died intestate in Yavapai County, Arizona, leaving heirs and survivors as alleged in said complaint; admit the residence of defendants alleged in said complaint, admit that no administrator has been appointed of the estate
24 of said Alonzo V. Miller in Yavapai County, Arizona;

Admit that on or about the 27th day of August, 1907, defendant Charles C. Miller and Alonzo V. Miller, now deceased, claimed to be, and allege that they were, the owners of certain interests in the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims mentioned in the complaint;

Admit that on said date certain litigation was pending in this court concerning some of said mining claims, and that on said date a certain contract in writing was entered into between plaintiff herein, defendant George B. Lasbury, Alonzo V. Miller, deceased, and this defendant, which contract is substantially copied out at length in said complaint, and was entered into for the purposes and considerations stated in said contract;

Admit that on the date of said contract, and for a long time prior thereto the United Verde Copper Company held a certain contract for the purchase of said West Brooklyn mining claims, which contract is referred to in the aforesaid contract of August 27, 1907;

Deny that since August 27, 1907, these defendants have, with others, mined and sold silica from said West Brooklyn mining claim as alleged in the complaint, or otherwise, in violation of the contract of that date;

25 Deny that the proceeds of any sales of silica have been converted or misappropriated by defendants either as alleged in the complaint or otherwise;

Deny each and every, all and singular the other allegations contained in said complaint, except such as are herein admitted or qualified;

Further answering said complaint these defendants deny that they or any of them, or that Alonzo V. Miller ever made to plaintiff any statement or representation that would induce it to enter into said contract or that tended to such inducement in any manner whatever.

Deny that any representations or statements made by these defendants or by Alonzo V. Miller either induced or entered into the considerations of said contract of August 27, 1907;

Deny that there has been any default upon the part of these defendants or any of them in carrying out said contract according to its terms and requirements;

Admit that defendants have refused to convey to plaintiff said West Brooklyn mining claim, but deny that they have refused to convey to plaintiff the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, or either of them, or have refused to perform any of the requirements of said contract,

but on the contrary these defendants allege the fact to be
26 that they have been at all times and now are ready and willing to fully perform the requirements of said contract on their part to be performed and allege that they have frequently tendered such performance to plaintiff, and that such tender has been uniformly declined and refused by plaintiff; that the failure of defendants to have fully and completely transferred and delivered said West Brooklyn mining claim to the United Verde Copper Company, and to have received all of the money in payment therefor on or before January 1, 1908, was caused solely by plaintiff's failure and refusal to perform its part of the contract, dated August 27, 1907, by dismissing its suit pending at the time said contract was entered into, the dismissal of which action was the sole and only consideration for said contract to be rendered and performed by plaintiff;

Deny that plaintiff has performed, or offered to perform the requirements of said contract on its part to be performed;

Deny that the case of Brooklyn Mining & Milling Company vs. Miller et al., mentioned in the first paragraph of said contract of August 27, 1907, was dismissed as required by said contract;

Deny that plaintiff has ever offered to pay the reasonable value of the assessment work on the North Brooklyn, Empress and
27 Midway mining claims for the year 1907, and allege that prior to the first day of January, 1908, and at all times since said date and until the filing of this action plaintiff has uniformly refused to perform the requirements of said contract on its part to be performed;

Deny that it was ever agreed that One Hundred and Fifty Dollars would be accepted from plaintiff in payment of the assessment work on the North Brooklyn, Empress and Midway mining claims, either in the manner, form or effect alleged in Paragraph Nine of the complaint herein, or otherwise;

Deny that plaintiff has, or has ever had any right, title or interest in said West Brooklyn mining claim, or the product of proceeds thereof; deny that said mining claim has been or will be in any manner damaged or depreciated in value by the removal of silica therefrom, and allege the fact to be that the mining work heretofore done and now being done upon said mining claim has actually increased, and will continue to increase the value thereof;

Deny that plaintiff has ever become or is now entitled to a conveyance from these defendants of any of their right, title or interest in said West Brooklyn mining claim.

Wherefore, these defendants pray that plaintiff take noth-
28 ing by its said complaint and that they have judgment for their costs herein expended.

(Signed) REESE M. LING,
NORRIS & ROSS,
Attorneys for Defendants, Charles C. Miller, Ada M. Miller, Charles C. Miller, No. 2, and Charles C. Miller, No. 2, as Guardian ad Litem, a Minor.

Come now defendants above named and further answering and by way of cross-complaint allege:

I.

That plaintiff is a corporation organized under the laws of the Territory of Arizona and doing business in Yavapai County, Arizona. That defendant and cross-complainants Charles C. Miller, Ada M. Miller, Charles C. Miller No. 2, and Charles C. Miller No. 2, as Guardian ad litem of George Miller, a Minor, are residents of Yavapai County, Arizona.

II.

That cross-complainants above named are the owners, entitled to the possession and in the possession of that certain mining claim situate in the Big Bug mining district, Yavapai County, Arizona, and described as follows:

"West Brooklyn" notice of location whereof is of record in
29 Book 67 of Mines, page 408, Records of Yavapai County, Arizona.

III.

That cross-complainants herein are credibly informed and believe that plaintiff, Brooklyn Mining & Milling Company, makes some claims to said mining claim adverse to these cross-complainants.

Wherefore, cross-complainants pray judgment as follows:

(1) That cross-complainants' estate in said mining claim be established.

(2) That said Brooklyn Mining & Milling Company, a corporation, be forever barred and estopped from having or claiming any right or title to said premises adverse to said cross-complainants.

(3) For costs of suit and for such other or different relief as may be proper in the circumstances.

(Signed) REESE M. LING,
NORRIS & COSS,
Attorneys for Cross-Complainants, Charles C. Miller, Ada M. Miller, Charles C. Miller, No. 2, as Guardian ad Litem of George Miller, a Minor.

TERRITORY OF ARIZONA,
County of Yavapai, ss:

Charles C. Miller, being duly sworn according to law, de-
30 poses and says: That he is one of the defendants and cross-complainants in the above entitled action and makes this affidavit for himself and in behalf of his co-defendants and cross-complainants; that he has read the foregoing answer and cross-complaint and knows the contents thereof and that the same is true in substance and in fact.

(Signed) CHARLES C. MILLER.

Subscribed and sworn to before me this 25th day of March, 1909.
(Signed) FRANK O. SMITH
[SEAL.] *Notary Public.*

My commission expires June 26, 1912.

(Endorsed: Filed March 25, 1909.)

31 *Reply to Amended Answer and Cross-Complaint.*

(NOTE.—By an order entered March 25, 1909, shown in the minute entries of the trial court, this reply was considered and treated as a reply to the foregoing amended answer and cross complaint. See minute entries March 25, 1909.)

[Title of Court and Cause.]

Comes now the Brooklyn Mining & Milling Company, a corporation and plaintiff in the above entitled cause, and for reply to the amended answer and cross-complaint of Charles C. Miller, Ada M. Miller and Charles C. Miller No. 2, and to all of the matters and things pleaded in said amended answer and cross-complaint, the plaintiff avers:

First. It denies each and all of the allegations in said amended answer and cross-complaint contained, together with the demurrer, plea in abatement therein, except such allegations as are specific admissions of averments contained in the plaintiff's complaint.

Second. Further replying to said amended answer and cross-complaint, this plaintiff alleges that at all of the times hereinafter mentioned, the District Court in and for the County of Douglas
32 and State of Nebraska, was and is a court of general jurisdiction, duly created and organized under and by virtue of the laws of the State of Nebraska.

(*a*) That on the 28th day of January, 1908, the plaintiff commenced an action in said District Court of Nebraska, wherein Charles C. Miller, George B. Lasbury, Ada M. Miller, Charles C. Miller No. 2, and George Miller were named as defendants, and that summons and process were duly issued out of said Court by the Clerk thereof and *was* duly and personally served upon defendants George B. Lasbury and Ada M. Miller, the other named defendants being non-residents of the State of Nebraska, and service of summons could not be had upon them in said state, and no service, either constructively or in person, was ever had upon said named defendants, Charles C. Miller, Charles C. Miller No. 2, and George Miller. The object and purpose of said action was to require defendants George B. Lasbury and Ada M. Miller to specifically perform the contract in writing in question in this suit, a copy of which is set out in the plaintiff's complaint, and which is dated August 27, 1907, and praying that said defendants be required by said District Court to convey by good and sufficient deed, all of their interests, rights and

title in and to the mining claims described in plaintiff's said complaint which the last named defendants had or claimed in
33 and to said mining claims, as of the date of August 27, 190[illegible], and all of the interests or claim which Alonzo V. Miller, deceased, had in and to said named mining claims, as of said date, and further praying in the alternative that in the event of a failure of said defendants to convey, that the said District Court appoint a commissioner to execute a deed conveying said interests to the plaintiff; that the interest sought to be acquired from the said Ada M. Miller, by reason of said suit, was such interest as she took by reason of being the wife of Alonzo V. Miller during his lifetime, and by reason of his having died intestate, the said Ada M. Miller then being his widow, and the interest which the said Ada M. Miller may have acquired from said Alonzo V. Miller by conveyance from said Alonzo V. Miller to said Ada M. Miller, subsequent to the execution of said written contract dated August 27, 1907. A copy of the petition in said case in the District Court of Douglas County, Nebraska, is hereto attached and made a part of this reply by reference and identified and marked Exhibit "A."

(*b*) On the 13th day of April, 1908, defendants George B. Lasbury and Ada M. Miller answered in said suit and submitted themselves to the jurisdiction of said District Court, a copy of which said answer is hereto attached marked Exhibit "B," and made a part of this reply by reference thereto.

(*c*) On the 29th day of May, 1908, the plaintiff in said
34 suit in said District Court, filed its reply to said answer of defendants Lasbury and Ada M. Miller, a copy of which is hereto attached, marked Exhibit "C," and made a part of this reply by reference thereto.

(*d*) Afterwards said cause came on to be tried in said District Court upon the pleadings aforesaid, and the issues thereby joined, and thereupon, such proceedings were had therein in said court, on the 8th day of February, 1909, that a judgment and decree was duly given and made by said court in favor of the plaintiff and against the defendants George B. Lasbury and Ada M. Miller, requiring said George B. Lasbury and Ada M. Miller to execute and deliver to the plaintiff a good and sufficient deed conveying to the plaintiff herein all of the interests of said Lasbury and Ada M. Miller, in and to the mining claims referred to in the plaintiff's complaint in this action within 30 days from the 8th day of February, 1909, and in default thereof, named James E. Rait, a commissioner appointed by said court for the purpose of making a conveyance of said interests, execute and deliver to the plaintiff a good and sufficient deed conveying the interests of said Lasbury and Ada M. Miller, as per the terms of said decree, *and* copy of which said decree is hereto attached, marked and identified as Exhibit "D," and expressly made a part of this reply by reference thereto.

35 (*e*) That the judgment and decree of the District Court of Douglas Cou-ty, Nebraska, is final and has not been modified, vacated or reversed, and that no appeal has been taken therefrom and no supersedeas bond has been given to supersede said decree and

judgment of the Court, although under the laws of the State of Nebraska the time for superseding said decree has expired, the law of Nebraska requiring that a supersedeas bond be filed within twenty days after the entry of a decree such as this decree was, said decree having been entered of record in the office of the Clerk of the District Court of said Douglas County, on the 16th day of February, 1909.

(*f*) That by reason of the premises aforesaid and of the judgment and decree aforesaid, the plaintiff herein is the owner of the one-half interest in and to the mining claims mentioned in the plaintiff's complaint and more particularly, the West Brooklyn, East Brooklyn and South Brooklyn mining claims so described, they being the interest owned and held by the said defendant Lasbury at the time of the execution of the contract in suit in this case and in suit in the case in said District Court, dated August 27, 1907, and likewise the plaintiff became the owner of such interest in all of said mining claims mentioned in the plaintiff's complaint, which the defendant Ada M. Miller had and held by reason of her being
36 the widow of Alonzo V. Miller, deceased, who during his lifetime signed said written contract of August 27, 1907, and also such interest as she may have acquired from said Alonzo V. Miller during his lifetime by conveyance subsequent to the date of said written contract, and that by reason of the premises aforesaid, defendants herein answering are barred and estopped of record to claim any interest in and to said mining claims or either of them so as aforesaid owned by said defendants Ada M. Miller and George B. Lasbury and said Alonzo V. Miller, deceased.

(*g*) On the 13th day of March, 1909, pursuant to and in compliance with said decree and judgment of the District Court of Douglas County, Nebraska, said James E. Rait executed a deed, conveying the interest in said mining claims to the plaintiff, in accordance with said decree and judgment, and that said deed was duly delivered to the plaintiff herein in accordance with the terms of said decree on said day, and the plaintiff now in addition to being the owner of the interests of said Lasbury and Ada M. Miller aforesaid, is in the possession of the legal title to said interests by reason of said decree and said deed, and the delivery thereof.

Wherefore, plaintiff renews its prayer as set forth in its complaint, and further prays that the answering defendants herein take
37 nothing by reason of their amended answer or cross-complaint.

(Signed) BROOKLYN MINING & MILLING COMPANY,
By CHARLES W. PEARSALL,
Its President.
JNO. J. HAWKINS,
THOMAS C. JOB,
Attorneys for Plaintiff.

STATE OF NEBRASKA,
County of Douglas, ss:

Charles W. Pearsall being first duly sworn, deposes and says that he is the President of the Brooklyn Mining & Milling Company, plaintiff in the above entitled cause, and that he is the managing agent of said corporation and as such, verifies these pleadings; that the plaintiff is a corporation, and for that reason does not verify the same.

Affiant further says that he has read the foregoing reply and knows the contents thereof, and the same is true in substance and in fact.

(Signed) CHARLES W. PEARSALL.

Subscribed in my presence and sworn to before me, this 13th day of March, 1909.

[SEAL.] (Signed) LORENE N. ATWELL,
Notary Public.

38 EXHIBIT "A."

In the District Court of Douglas County, Nebraska.

BROOKLYN MINING & MILLING COMPANY, Incorporated, Plaintiff,
vs.
CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER, and GEORGE MILLER, Defendants.

Petition.

Comes now the above named plaintiff, and for cause of action against the above named defendants, avers:

1. At the present, and at all times hereinafter mentioned, the plaintiff is and was a corporation duly organized and existing under and by virtue of the laws of the Territory of Arizona.

2. In the month of December, 1907, Alonzo V. Miller, one of the signers of the written contract hereinafter set forth, who signs A. V. Miller, died intestate, a resident and citizen of Omaha, Douglas County, Nebraska, leaving surviving him as his widow, the defendant Ada M. Miller, and as his sole and only heirs, the de-
39 fendants Charles C. Miller, and George Miller, the said George Miller being a minor over the age of fourteen years, and no administrator has been appointed over the estate of said deceased, or for said deceased.

3. Charles C. Miller, son of deceased, is a nephew of the other defendant Charles C. Miller, and will be hereafter referred to in this pleading as Charles Miller, for the purpose of brevity and identification.

4. On the 27th day of August, 1907, defendants Charles C. Miller, George B. Lasbury, and the deceased Alonzo V. Miller, claimed to

have rights, titles and interests, in some manner, in and to what is now and was then known as the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway claims, all located and situate in the Big Bug Mining District, Yavapai County, Territory of Arizona, and all of which claims had previously been located and location notices recorded in the office of the County Recorder of said County, said locations having been made in the name of the following persons, to-wit: East Brooklyn, West Brooklyn and South Brooklyn in the names of Charles C. Miller, Alonzo V. Miller, Thomas H. Ensor, and George B. Lasbury; North Brooklyn, Empress and Midway in the names of Charles C. Miller, Alonzo V. Miller, and George B. Lasbury, the said Charles C. Miller locating the said claims being the uncle of defendant Charles Miller,
40 and the person signing said contract as Charles C. Miller.

5. On said date a contract in writing was entered into by and between the plaintiff herein, on the one side, and Charles C. Miller and George B. Lasbury, defendants, and Alonzo V. Miller deceased, on the other, a copy of which writing was and is in words and figures following, to-wit:

Whereas, an action is now pending in the District Court of Yavapai County, Arizona, entitled Brooklyn Mining & Milling Company et al., vs. Charles C. Miller, Alonzo V. Miller, and George B. Lasbury, which action relates to the title to the West Brooklyn, East Brooklyn and South Brooklyn mining claims located in said county and territory, and relates to an accounting for ores and minerals taken therefrom, and

Whereas, the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury have made a conditional sale of the above named West Brooklyn Mining Claim for the sum of ten thousand dollars to the United Verde Copper Company, and

Whereas, an action is pending in the District Court of Yavapai County, Arizona, entitled Charles C. Miller vs. Brooklyn Mining & Milling Company for several thousand dollars claimed to be due and owing to the said Charles C. Miller for services performed by him and Alonzo V. Miller for the said Brooklyn Mining & Mill-
41 ing Company, and

Whereas, it is the desire of the parties connected with the foregoing causes of action to settle same and to adjust the matters of difference between said parties in connection therewith;

Therefore, in consideration of the dismissal and settlement of the foregoing causes of action it is hereby stipulated and agreed by and between the Brooklyn Mining & Milling Company and Charles C. Miller, Alonzo V. Miller and George B. Lasbury that if the sale of the West Brooklyn Mining Claim to the said United Verde Copper Company is consummated on or before the first day of January, 1908, the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to transfer and deliver to the said Brooklyn Mining & Milling Company one hundred and seventy-five thousand shares (175,000) of stock in said Brooklyn Mining & Milling Company, free and clear of all liens and incumbrances whatsoever; it being understood that said transfer of stock is to include all of the hold-

ings of said Charles C. Miller, Alonzo V. Miller and George B. Lasbury in the Brooklyn Mining & Milling Company, and that the said parties are to receive therefor the sum of 3 (Three) cents per share for said stock; and in addition thereto Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to pay to the Brooklyn
42 Mining & Milling Company the sum of eight thousand five hundred dollars ($8,500.00) out of the proceeds derived from the sale of the said West Brooklyn mining claim; in addition thereto the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey all of their right, title and interest in and to the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and said transfers shall contain the warranty that the assessment work has been done for the year 1907 upon the Dale and North Brooklyn and the said Brooklyn Mining & Milling Company shall pay for said assessment work at its reasonable value. The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury agree to do the assessment work for the year 1907, on the East and South Brooklyn mining claims, and said assessment work so to be performed is to be paid for by the Brooklyn Mining & Milling Company at its reasonable value. It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury shall not be consummated on or before the first day of January, 1908, then the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey to the Brooklyn Mining & Milling Company all of their right,
43 title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value.

It is understood by and between the parties hereto that the foregoing does not concede or admit any of the allegations contained in the pleadings of said causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties and avoiding further costs and expenses to the parties hereto.

In witness whereof, we have hereunto set our hands this 27th day of August, A. D. 1907.

(Signed) C. C. MILLER.
A. V. MILLER.
G. B. LASBURY.
BROOKLYN MINING & MILLING COMPANY,
By CHAS. W. PEARSALL, *President.*

Which said contract in writing was entered into and delivered for the purposes therein stated in the preamble thereof, and in consideration of the doing of the things in said contract provided, as therein set forth, and other considerations

6. When said contract was executed, Charles C. Miller,
44 George B. Lasbury, defendants, and Alonzo V. Miller, deceased, represented to the plaintiff that they had entered into a contract with the United Verde Copper Company, a corporation, doing business in said county and elsewhere in the United States, which said Company was then possessed of several millions of dollars of capital, and extensive mining and smelting interests and machinery, buildings and plants, in and in the vicinity of said county and elsewhere, by the terms of which contract the said United Verde Copper Company had an option or conditional contract and writing to purchase from said parties the said West Brooklyn mining claim, said contract of conditional purchase or option being the one referred to in said written contract between this plaintiff and said other named parties. At said time the plaintiff denied the right of said Charles C. Miller, Alonzo V. Miller, and George B. Lasbury to sell said West Brooklyn claim, and denied that they had any right, title or interest therein, as owners of said claim, and as one of the considerations for entering into said written contract to which plaintiff was a party, and as one of the inducements to the execution of said contract and permitting said conditional contract of purchase to be consummated by said United Verde Copper Company, it was understood and a well known belief that if the
45 said United Verde Copper Company should become the owner of said West Brooklyn claim, that fact, taken in connection with the fact that said United Verde Copper Company would likely improve, develop, and explore said claim, the value of plaintiff's other claims, to-wit: North Brooklyn, East Brooklyn, South Brooklyn, Empress and Midway claims, which adjoin said West Brooklyn claim, would be materially enhanced to the plaintiff.

7. The sale of the West Brooklyn mining claim to said United Verde Copper Company, referred to in the contract herein set forth, and copied into this pleading, was not consummated on or before January 1, 1908, nor have any of the covenants and obligations referred to in said contract to be performed, on condition of the consummation of such sale to the United Verde Copper Company on or before January 1, 1908, ever been performed, nor was it the intention or purpose of any of the parties to said contract that any of said covenants and conditions should be performed, except in the event of the consummation of such sale therein referred to, to said United Verde Copper Company. By reason of the fact that said sale was not consummated as per the terms of the said agreement, the plaintiff avers that so much of said written contract as depended upon the consummation of said sale has become obsolete and
46 has been rescinded by virtue of the stipulations in said contract provided.

8. Plaintiff avers that the portion of the contract which it now seeks to enforce, including the preamble and down to the word "therefore," and excluding that portion of it commencing with the words "Therefore, in consideration of the dismissal," etc., and ending with the words "Brooklyn Mining & Milling Company at its reasonable value," is as follows:

It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury shall not be consummated on or before the first day of January, 1908, then the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey to the Brooklyn Mining & Milling Company all of their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Bro-klyn, Empress and Midway mining claims, and the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value.

It is understood by and between the parties hereto that the foregoing does not conceded or admit any of the allegations con-
47 tained in the pleadings of said causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties and avoiding further costs and expenes to the parties hereto."

9. Plaintiff says that the said Charles C. Miller, George B. Lasbury, defendants, Alonzo V. Miller, deceased, and the defendants Ada M. Miller, Charles Miller, and George Miller, have failed and refused, each and all of them, to convey to the Brooklyn Mining & Milling Company, all or any of their right, title or interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, but the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 was done.

10. The plaintiff stands ready and willing, and has at all times on and since the 1st day of January, 1908, stood ready and willing to pay the fair and reasonable value of the assessment work on said last named claims, as provided in said contract, and has stood ready and willing, and now is ready and willing to perform each and all of the covenants and agreements, and obligations in said contract, wheresoever found, to be by it performed, as per the terms and conditions of said contract, and now offers to perform each and all of the covenants, agreements, conditions and obligations by it
48 to be performed under the terms of said contract.

Amendment to Paragraph 10 of Petition.

Since the commencement of this action the suit pending in the district court of Yavapai County, Arizona, and referred to in the contract copied into this petition, upon which contract this suit is predicated, has been finally and fully dismissed, and that part of the contract requiring the plaintiff herein to dismiss said suit has been fully complied with.

11. That defendants Charles Miller, Charles C. Miller and George Miller are each and all non-residents of the State of Nebraska, and absent therefrom, and are without the jurisdiction of this Court, so that summons cannot be served upon them, or either of them.

12. Plaintiff avers, upon information and belief obtained from the defendants, that prior to the death of said Alonzo V. Miller, deceased, the said Alonzo V. Miller, executed and delivered a conveyance to the defendant Ada M. Miller, of all of his right, title and interest in and to each and all of the mining claims hereinbefore named, and that upon said information and belief further avers that at the present time and ever since the execution of the said deed by said deceased to said Ada M. Miller, said defendant Ada M. Miller is and was the owner of such interest, right and title in and to said mining claims as the said Alonzo V. Miller owned and pos-
49 sessed when said deed was executed, as aforesaid, and no other, subject to said compromise contract.

13. Plaintiff further avers, however, that if it has been misinformed as to said conveyance from said deceased to his said wife, then in that event defendants Charles Miller and George Miller, as the sole and only heirs of said deceased and defendant Ada M. Miller, as his widow, took by operation of law, all of the interest, right and title in and to said mining claims as said deceased owned and possessed at the time of his death.

14. Plaintiff avers in connection with that paragraph of the contract which requires the plaintiff herein to pay the fair and reasonable value for doing the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907, that the plaintiff and defendants have heretofore agreed that that portion of the contract may be considered as fulfilled upon the payment of the sum of One Hundred and Fifty Dollars ($150.00) and that as between the plaintiff and defendants, a payment by the plaintiff to the defendants of the sum of One Hundred and Fifty Dollars ($150.00) shall be a compliance with that provision of said contract.

Wherefore, this plaintiff prays this Honorable Court, as follows:

1. That the defendants and each of them be required, by
50 the judgment and decree of this Court, to convey to the Brooklyn Mining & Milling Company, incorporated, under and by virtue of the laws of the Territory of Arizona, all of their and each of their separate interests which they own or claim to own in their own right, or which any of them own or claim to own as sole heirs of Alonzo V. Miller, deceased, or as the widow of said deceased, and all right, title and interests which they may own or claim to own, as of the time of August 27, 1907, and subsequent thereto, which either Charles C. Miller, George B. Lasbury, defendants, Alonzo V. Miller, deceased, had in and to said premises at the time of executing the contract set forth in this petition, dated August 27, 1907.

2. That the fair and reasonable value of the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 be by this Court ascertained and decreed, but not to exceed the sum of One Hundred and Fifty Dollars ($150.00) and that the plaintiff herein may be permitted to pay the same into Court, for the use and benefit of the defendants and their successors and assigns under the contract of August 27, 1907, set forth in this petition.

3. That an order be entered herein, permitting the plaintiff to

dismiss the suit referred to in said contract of August 27, 1907, set forth in this petition, upon the compliance of the defendants
51 with the decree of this Court, as prayed in subdivision number one (1) of the prayer hereof; or upon the conveyance, if need be, by a commissioner appointed by this Court as prayed, in the following sub-division of this prayer.

4. In the event that the defendants against whom judgment and decree of this Court shall run, shall fail to execute a conveyance as prayed in paragraph one (1) of this prayer, for the space of twenty days from the entry of said decree, then in that event such right, title and interest which the defendants herein may have, and against whom the decree of this Court shall run, shall be decreed and adjudged to hold such right, title and interest which may be adjudged to be conveyed to the plaintiff, in trust for the plaintiff and for the benefit of the plaintiff, Brooklyn Mining & Milling Company, and that a commissioner be by this Court appointed for the purpose of executing a proper conveyance of all right, title and interest in any of the defendants, over which this Court obtains jurisdiction, may have or claim to have in and to any of the North Brooklyn, East Brooklyn, South Brooklyn, West Brooklyn, Empress and Midway claims, giving to said commissioner full power and authority to convey by deed of said commissioner, under the order of this Court, all of said interests.

52 5. Plaintiff herein further prays for all other, further, and different relief as justice and equity may require, on the pleadings, facts and proofs in this cause, and for costs of this action.

BROOKLYN MINING & MILLING COMPANY,
By NELSON C. PRATT AND
JEFFERIS & HOWELL,
Its Attorneys.

STATE OF NEBRASKA,
County of Douglas, ss:

Charles W. Pearsall being first duly sworn, deposes and says that the Brooklyn Mining & Milling Company is a corporation organized and existing under and by virtue of the laws of the Territory of Arizona, and for that reason the plaintiff herein does not verify this pleading.

Affiant further says that he is the president of said corporation, and agent thereof, and authorized to verify this pleading; that the facts set forth in the foregoing petition are true, as he verily believes.

CHARLES W. PEARSALL.

Subscribed in my presence and sworn to before me, this 28th day of January, 1908.

[SEAL.] NELLIE BOLAND,
Notary Public.

53 EXHIBIT "B."

In the District Court of Douglas County, Nebraska.

BROOKLYN MINING & MILLING COMPANY, INCORPORATED, Plaintiff,
vs.
CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER, and GEORGE MILLER, Defendants.

Answer.

Come now the above named defendants, George B. Lasbury, and Ada M. Miller, and each for himself and herself, in answer to plaintiff's petition herein, aver:

1. Said answering defendants and each of them, deny each, every and all the allegations in said petition contained, save such as are hereinafter specifically admitted.

2. Said answering defendants admit that Alonzo V. Miller died in December, 1907, and left surviving him, Ada M. Miller, Charles C. Miller and George Miller, as his heirs at law, the latter being a minor over the agove of fourteen years; that C. C. Miller, A. V. Miler, G. B. Lasbury and the Brooklyn Mining & Milling Company en-
54 tered into a contract on or about August 27, 1907, a substantial copy of which is set out in plaintiff's petition; that Charles C. Miller and George Miller are non-residents of the State of Nebraska.

3. Said answering defendants further say that each, every and all conditions in said contract to be performed by the said C. C. Miller, A. V. Miller and G. B. Lasbury by them were performed, within the time specified therein and these answering defendants allege the fact to be that the sale of said property mentioned in said contract to be made to the United Verde Copper Company was fully consummated within the time therein specified and the property therein mentioned duly and properly conveyed to said United Verde Copper Company and these answering defendants aver that the amount of money due to said plaintiff under said contract and the number of shares of stock to be turned over to it, together with the deed to said property, were all duly tendered and offered to it within the time specified in said contract and said parties so agreeing to pay said money and turn over said stock and convey said property as in said contract provided, are now able, ready and willing to turn over and deliver the same to said plaintiff and these answering defendants aver that said parties have performed each and every condition of said contract to be by them performed, and notwithstanding their perform-
55 ance of said conditions the said plaintiff has refused to accept said money, stock and deed of conveyance, as aforesaid and has wholly failed and refused to perform any of the conditions to be by it performed under said contract.

Wherefore, said defendants and each of them pray that plaintiff's petition herein be dismissed and that they and each of them recover

their costs herein expended and for such other and further relief as in equity and good conscience they are entitled to.

(Signed) HALL & STOUT,
Attorneys for Ada M. Miller and George B. Lasbury.

STATE OF NEBRASKA,
Douglas County, ss:

Ada M. Miller, being first duly sworn, says that she is one of the above named answering defendants; that she has read the foregoing answer, knows the contents thereof and believes the allegations therein contained to be true.

(Signed) ADA M. MILLER.

Subscribed in my presence and sworn to before me this 13th day of April, A. D. 1908.

[SEAL.] EDITH OLSEN,
Notary Public.

56 EXHIBIT "C."

In the District Court of Douglas County, Nebraska.

BROOKLYN MINING & MILLING COMPANY, INCORPORATED, Plaintiff,
vs.
CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER, and GEORGE MILLER, Defendants.

Reply of Brooklyn Mining & Milling Co. to Answer of Defendants.

Comes now the plaintiff and for reply to answer of defendants filed herein denies each and every allegation therein contained except such as admit or confirm the allegations of plaintiff's petition.

JEFFERIS & HOWELL &
NELSON C. PRATT,
Attorneys for Plaintiff.

STATE OF NEBRASKA,
Douglas County, ss:

Nelson C. Pratt, one of the Attorneys for plaintiff, being first duly sworn, deposes and says that said plaintiff is a corporation and
57 absent from Douglas County, Nebraska; that he believes the facts stated in the foregoing reply to be true.

NELSON C. PRATT.

Subscribed in my presence and sworn to before me this 28th day of May, 1908.

[SEAL.] EDWARD M. WELLMAN,
Notary Public.

Exhibit "D."

In the District Court of Douglas County, Nebraska.

100-178.

Brooklyn Mining & Milling Company, Incorporated, Plaintiff,
vs.
Charles C. Miller, George B. Lasbury, Ada M. Miller, Charles C. Miller, and George Miller, Defendants.

Decree.

This cause came on to be heard upon the petition of the plaintiff, the answer of George B. Lasbury and Ada M. Miller, and the reply to said answer and the evidence, for final decree, said cause having been heretofore submitted to the Court and taken under advisement at the October, 1908, term of said District Court.

58 Now, on this 8th day of February, 1909, and after due consideration, the Court finds that legal service has been had in this cause upon the defendants, George B. Lasbury and Ada M. Miller, within Douglas County, Nebraska, and that this Court has jurisdiction over the persons of said named defendants and of the subject matter of said suit, and that the plaintiff is entitled to the specific execution of the contract set forth in said petition, to the end that the said defendants George B. Lasbury and Ada M. Miller shall convey to the plaintiff, all of their rights, title and interests, of whatsoever nature and kind, in and to the West Brooklyn, North Brooklyn, East Brooklyn, South Brooklyn, Empress and Midway mining claims, located and situate in the Big Bug Mining District, Yavapai County, Territory of Arizona, all of which claims have been previously located and location notices recorded in the office of the County Recorder of said Yavapai County.

The Court further finds that the plaintiff herein has performed each and all of the covenants and agreements in said written contract required to be performed on its part, and that there was no consummation of the sale of the said West Brooklyn mining claim to the United Verde Copper Company, mentioned in said written contract, prior to the first day of January, 1908, on the first day of January, 1908, or thereafter.

59 The Court further finds that the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907, has been performed in the sum of Three Hundred Dollars ($300.00), as fixed by law; that said work was performed by some, or all, of the defendants for and on behalf of the parties signing said contract sought to be enforced, to-wit: C. C. Miller, A. V. Miller, George B. Lasbury, the Brooklyn Mining & Milling Company, and the legal representatives of A. V. Miller, deceased, which said assessment work was done prior to January 1, 1908, as

required by law, and that upon the payment, by plaintiff, of said sum, it shall be in full and complete payment for the assessment work to be paid by said plaintiff.

The Court finds that the suits referred to in said written contract of August 27, 1907, have been fully and finally dismissed, said dismissals of each suit having taken place subsequent to the first day of January, 1908, and that such dismissals were agreeable to the terms of said contract.

It is therefore considered and adjudged by the Court: That defendants George B. Lasbury and Ada M. Miller shall convey by good and sufficient deed, to the Brooklyn Mining & Milling Company, plaintiff herein, all of their rights, title, interests, or claim in and to the East Brooklyn, West Brooklyn, North Brooklyn, South Brooklyn, Empress and Midway mining claims, located and
60 situate in the Big Bug Mining District, Yavapai County, Territory of Arizona, which claims were located and location notices recorded in the office of the County Recorder of said Yavapai County.

In the event the defendants, George B. Lasbury and Ada M. Miller, or either of them, shall default for the period of 30 days from February 8, 1909, in making such deeds, it is ordered that James E. Reit, of Omaha, Nebraska, who is hereby appointed commissioner of and for this Court, shall convey to the plaintiff herein, by a good and sufficient deed, the interests herein decreed to be conveyed, in and to said premises by the defendants, George B. Lasbury and Ada M. Miller, and said commissioner is ordered to execute such deed and deposit the same with this Court, to be by the Clerk of this Court delivered to the Brooklyn Mining & Milling Company, or its attorneys or authorized agents, upon the payment into court by the Brooklyn Mining & Milling Company, of the sum of Three Hundred Dollars ($300.00), for assessment work on the North Brooklyn, Empress and Midway mining claims for the year 1907, said Clerk to hold said money and pay the same out to such of the defendants as are entitled to receive the same.

It is further adjudged that the plaintiff recover from the defendants, George B. Lasbury and Ada M. Miller, the costs of this
61 suit, and its costs herein, taxed at — Dollars, ($—).

The defendants, George B. Lasbury and Ada M. Miller, each severally and separately except to each and all of the foregoing findings, judgment and orders of the Court, and they are hereby allowed forty days from the rising of the Court, in which to prepare and serve a Bill of Exceptions.

Dated February 8, 1909.

By the Court:

(Signed) WILLIAM A. REDICK, *Judge.*

(Endorsed: Filed March 23, 1909.)

Motion to Strike and Replication.

[Title of Court and Cause.]

Come now the answering defendants herein and move the Court to strike from the files of this action, all that portion of the pretended reply of the plaintiff herein, beginning with the word "second" in the twelfth line below the title on the first page thereof and extending to and including the words "and the delivery thereof" in the first line of page 5 thereof, together with Exhibits "A," "B," "C" and "D" attached thereto, for the following reasons:

I.

That heretofore on the 22nd day of December, 1908, upon
62 a consideration by this Court of an application by plaintiff herein for a continuance of this action, it was orally stipulated and agreed by plaintiff herein acting through its counsel that if said motion for continuance were granted by this Court, any judgment thereafter rendered in the District Court of Douglas County, State of Nebraska, in the action then pending between the parties hereto, being the same action referred to in plaintiff's pretended reply would not be thereafter set up or pleaded by plaintiff in this action.

That said stipulation was thereupon taken down in shorthand by the reporter of this Court at the request of the respective parties and thereby became and is a matter of record in this Court. That reference is hereby made to said reporter's notes in support of this motion.

That thereupon and in reliance upon, and in consideration of said stipulation, the said motion for continuance was granted as will appear from the records of this Court.

That the filing of said portion of said pretended reply is a plain and open violation of the said stipulation.

II.

That it appears upon the face of said reply that the pre-
63 tended judgment therein referred to and set forth purports to have been satisfied and discharged.

III.

That in and by said pretended reply, plaintiffs seek to add a new, distinct and independent ground of cause of action herein growing out of and based upon matters arising subsequent to the filing of this action.

IV.

It appears upon the face of said pretended reply and a portion thereof above designated that the judgment therein referred to and set forth, was rendered and entered in excess of the jurisdiction of the District Court of Douglas County, State of Nebraska, in this,

that in and by said judgment said Court seeks to transfer the title to real estate situated in Arizona, by and through a conveyance made by a commissioner appointed by said Court.

(Signed) REESE M. LING,
NORRIS & ROSS,
Attorneys for Answering Defendants.

Said defendants by way of replication to plaintiff's pretended reply herein, demur thereto, and for grounds of demurrer, allege:

I.

64 It appears upon the face of said pretended reply in the portion thereof above designated that the judgment therein referred to and set forth, was rendered and entered in excess of the jurisdiction of the District Court of Douglas County, State of Nebraska, in this that in and by said judgment said Court seeks to transfer the title to real estate situated in Arizona, by and through a conveyance made by a commissioner appointed by said Court.

II.

That said reply does not state facts sufficient to constitute a reply to the matters set forth in the amended answer and cross-complaint herein.

Wherefore, the defendants pray judgment as to the sufficiency of said reply and for costs.

(Signed) REESE M. LING,
NORRIS & ROSS,
Attorneys for Answering Defendants.

By way of further replication to said reply, these defendants without waiving the foregoing motion or demurrers, but if the same shall be over-ruled, allege:

I.

That plaintiff should not be permitted to interpose or plead the judgment set out in said reply for the reason that it is contrary to and in violation of the stipulation made and entered in open
65 session of this Court on the 22nd day of December, 1908, between the parties hereto, by which stipulation it was provided that in case the continuance of this action was granted, no judgment thereafter obtained in the Court described in said reply should be pleaded or interposed in this action, upon the faith of which stipulation, the continuance of the trial of this action was granted; and by reason of said stipulation, plaintiff is estopped to now plead such judgment.

II.

That said judgment has no binding force or effect upon this Court for the reason that it is entered and made by nisi prius court, and it appears upon the face of said reply that the right of appeal

still exists; and for the reason that the judgment is not supported by the statement and findings of fact, and opinion of the Court, upon which said judgment is based, a true and correct copy of which said statement and findings of fact is hereto attached marked Exhibit "A" and made a part of this replication;

That said judgment purports to have been fully executed, carried out and satisfied; that it appears upon the face of said judgment and findings that George B. Lasbury therein mentioned held no title or interest in or to the West Brooklyn mining claim at the time of the filing of the suit in which said judgment was
66 entered, nor at the time of the entering of said judgment;

That it does not appear upon the face of said reply, judgment and findings of fact that defendant, Ada M. Miller, at the time of the filing of said suit or at any other time, held any right, title or interest in said West Brooklyn mining claim.

III.

That the contract of August 27, 1907, was concerned alone with real estate situate in Yavapai County, Arizona, and with litigation then pending in this Court between the parties to this action; that all of the parties having or claiming to have any title or interest in the West Brooklyn mining claim are and at the time said contract was entered into were residents of Yavapai County, Arizona; that at the time the action referred to in the reply herein was instituted in the District Court of Douglas County, State of Nebraska, the parties to said action and to this action and to said contract were engaged in litigation in this Court, the purpose of which was to determine and establish the title to said West Brooklyn mining claim. That said contract of August 27, 1907, was based upon the consideration that the litigation then pending regarding the title to the West Brooklyn mining claim should be dismissed, but
67 the plaintiffs herein refused to dismiss this action as provided in said contract, and continued so to refuse and the same was still pending at the time and long after the institution of the suit in said Court of Nebraska, in which the judgment set up was rendered.

Wherefore, defendants pray that plaintiffs take nothing and that defendants have judgment according to the prayer of their amended answer.

(Signed) REESE M. LING,
NORRIS & ROSS,
Attorneys for Answering Defendants.

TERRITORY OF ARIZONA,
County of Yavapai, ss:

Charles C. Miller being duly sworn according to law, deposes and says: That he is one of the defendants and cross-complainants in the above entitled action; that he has read the foregoing replication and makes this affidavit in his own behalf and in behalf of his co-

defendants and cross-complainants, being duly authorized thereunto. That the allegations in said replication contained are true in substance and in fact.

(Signed) CHARLES C. MILLER.

Subscribed and sworn to before me this 25th day of March, 1909.

(Signed) FRANK O. SMITH,
[SEAL.] *Notary Public.*

My commission expires June 26, 1912.

68 EXHIBIT "A."

In the District Court of Douglas County, Nebraska.

BROOKLYN MINING & MILLING COMPANY, Plaintiffs,
vs.
CHARLES C. MILLER et al., Defendants.

Opinion.

This is an action for the specific performance of a contract hereinafter referred to, and the facts out of which the controversy arises are as follows:

The plaintiff, a corporation, prior to December, 1906, was the owner of the "Brooklyn" mining claim; the principal stockholders were Charles C. Miller, Alonzo V. Miller and George B. Lasbury; these gentlemen prior to that time had located in their own names three adjoining claims, viz: West Brooklyn, East Brooklyn and South Brooklyn; prior to December, 1906, Charles W. Pearsall purchased $15,000 shares of stock in the company, and claims that his purchase was induced by representations that the three claims above mentioned were in fact the property of the Brooklyn Mining & Milling Company.

69 It having subsequently developed that the three parties named claimed to own the West, East and South Brooklyn claims as individuals, Pearsall, in December, 1906, brought an action in behalf of himself and all other stockholders in Yavapai County, Arizona, where the claims are situated, against the three individuals named, and others, for the purpose of having it declared that they held the title to those claims in trust for the Brooklyn Mining & Milling Company, and requiring them to make conveyance.

While that action was still pending, and in May, 1907, said Charles C. Miller brought suit against the Mining Company in the same Court for over $5,000 claimed to be due him for work done on the "Brooklyn" claim. Issues were made up in both these actions and matters remained in this condition, until finally a compromise of both actions was agreed to on August 27, 1907; and this compromise agreement furnishes the basis of the present suit.

This agreement, after reciting the existence of the two suits above mentioned, proceeds:

"Whereas, it is the desire of the parties connected with the foregoing causes of action to settle same and to adjust the matters of difference between said parties in connection therewith;

Therefore, in consideration of the dismissal and settlement of the foregoing causes of action, it is hereby stipulated and agreed
70 "that if the sale of the West Brooklyn mining claim to the United Verde Copper Co. is consummated on or before the 1st day of January, 1908," and the said Millers and Lasbury shall "transfer to the Brooklyn Mining & Milling Company 175,000 shares of stock in said Company at three cents per share, and pay said Company $8,500 out of the proceeds derived from the sale of the said West Brooklyn claim;" also convey to said Company the East, South and North Brooklyn, Express and Midway claims; also do the assessment work on the Dale and North Brooklyn, East and South Brooklyn, and be allowed the reasonable value thereof.

It was then provided by said compromise agreement as follows: "If for any reason the sale of the West Brooklyn claim to the United Verde Copper Co. by the said Millers and Lasbury shall not be consummated on or before the 1st day of January, 1908, then said Millers and Lasbury are to convey to the Brooklyn Mining & Milling Company all their interest in the West Brooklyn, East, South and North Brooklyn, Empress and Midway claims; the assessment work on the North Brooklyn, Empress and Midway claims for 1907 to be paid for by the Company at its reasonable value."

It seems that prior to the time of the compromise agreement, the Millers and Lasbury had given the United Verde Copper
71 Co. an option to purchase the West Brooklyn and White Rock mining claims for $20,000; and the existence of this option, expiring about December 1, 1907, but later extended to January 1, 1908, prevented the immediate consummation of any compromise; the agreement therefore was made in view of the existence of this option; and the contingency of its being exercised by the Copper Company, and at the time fixed, viz: January 1, 1908, when the agreement should finally be carried out, one way or the other, accordingly as the contingent event occurred; i. e., if the sale was consummated on that date the stock was to be transferred, money paid, etc.; if not consummated, then the West Brooklyn claim was to be transferred to Brooklyn Mining & Milling Company, and in that event the Millers and Lasbury of course retained their 175,000 shares of stock.

The option referred to covers two claims, the West Brooklyn and White Rock, and the purchase price is fixed at $20,000, but for the purposes of this case, the West Brooklyn alone being involved, it may be taken as conceded, that the price for West Brooklyn was $10,000. At least, the parties have recited that fact in their agreement, and so far as the question is material to the issues here it will be treated as conceded.

Neither of the two suits referred to in the agreement were dismissed pending the settlement of the question of the option
72 to the United Verde Copper Co.; the Miller suit for services was finally dismissed January 2, 1908, and the Pearsall suit February 18, 1908; the latter suit, however, was immediately recom-

mended and is now pending in Arizona, but it is not the same suit that was commenced in December, 1906, although it was identical with that suit as its purpose and issues were expressed in the final supplemental complaint filed therein; the suit now pending seeks inter alia the same relief as is prayed for here.

On January 2, 1908, (the 1st being a legal holiday), the defendants made a complete tender of performance on their part of the contract of August 27, 1907, upon the theory, as they claim the fact to be, that the sale of the West Brooklyn to the United Verde Copper Company had, at and before that time, been consummated within the meaning of the contract.

The sufficiency of this tender is not a material question because of the grounds of plaintiff's refusal to accept it. The tender was refused by plaintiff on numerous grounds, the principal one being, however, that the sale to the Copper Company had not in fact been consummated, and that therefore the plaintiff was entitled to have a conveyance of the West Brooklyn and other claims from defendants under the second part of the contract.

The present action is to compel the defendants to convey
73 to plaintiff the West Brooklyn, East, South and North Brooklyn, Empress and Midway mining claims, the plaintiff alleging that the sale was not consummated on or before January 1, 1908.

The defendants answer and allege that "the sale of said property mentioned in said contract to be made to the United Verde Copper Co. was fully consummated within the time therein specified and the property therein mentioned duly and properly conveyed," etc.

It seems very clear, then, that the case turns upon the question of fact whether or not the sale had in fact been consummated on or before January 1, 1908.

What is the evidence on this point?

1. The option by which the Copper Company was given the right to purchase the West Brooklyn for $10,000 on or before January 1, 1908, expired with that date.

2. The Copper Company advanced to the Millers in December, 1907, $2,000, it being understood that the Millers should furnish that company with silica from the mine (used by the Copper Company in smelting operations), at $1.50 per ton; and if the Copper Company decided to purchase the claim the $2,000 was to be applied upon the purchase price of $10,000,—if not, the Company to retain its vouchers issued in payment for silica until the $2,000
74 was repaid. The Millers gave a due bill for the $2,000.

3. Subsequent to January 1, 1908, $600 more was advanced on substantially the same terms though the evidence does not show the giving of a due bill—it was simply charged to the Millers.

4. The $2,000 was subsequently, during January, February and March, 1908, paid back to the Copper Company by shipments of silica.

5. The $600 was likewise paid back in the same manner.

6. At the time the contract of August 27, 1907, was signed there was in the custody of Norris & Ross, attorneys, and had been since December, 1906, a deed from C. C. and A. V. Miller to the Copper

Company, conveying the West Brooklyn claim. Norris & Ross were attorneys for the Millers and also the Copper Company (the Lesbury interest seems to have been conveyed to the Millers December 14, 1906). This deed and the option were delivered to Norris & Ross together.

7. In November, 1907, Alonzo V. Miller died intestate, leaving a widow, Ada M. Miller, defendant, Charles Miller and George Miller (not served herein) as his heirs at law.

8. On January 2, 1908, C. C. Miller instructed Norris to deliver the deed for the West Brooklyn to the United Verde Company.

9. In compliance with these instructions the deed was
75 mailed to the Copper Company, and W. L. Clark, its assistant general manager, received it, but refused to accept it, and returned it to Norris & Ross "with instructions not to commit us to pay the purchase price until this title was settled, and otherwise not to record it unless it was to protect the amount we had advanced."

10. It seems pretty clear that the Copper Company was willing to purchase this claim at $10,000 whenever the litigation regarding it was ended; Clark testifies that he so informed Miller; but the Copper Company has never been in a position with reference to their option when they could be compelled to take and pay for the claim—they have never been bound to take it.

11. The deed to the Copper Company was not delivered because of its refusal to accept it—it lies today with the option the same as heretofore, subject to the acceptance of the Copper Company, if the option is still in force.

I have not attempted in the above to recapitulate the entire evidence having a bearing upon the question under investigation, but only such parts of it as seem to me to control the decision.

This contract must be construed with reference to the language used in it, giving to such language its ordinary meaning, and taking into consideration the situation of the parties at the time and the result they sought to accomplish. Now, leaving out the somewhat technical language used in the contract, and stating
76 it in commoner terms, it amounts to this: Two suits were pending between the parties. The plaintiff's suit was to recover for itself from the defendants the title to the West Brooklyn claim. The defendants' suit was to receive from the Brooklyn Company moneys claimed to be due for services rendered. It was desired to compromise or compose the several claims of the parties, and the Brooklyn Mining & Milling Company said to the defendants, "If you sell the West Brooklyn claim to the United Verde Copper Company under the option now held by them on or before January 1, 1908, we will give up our claim to that mine and accept in lieu thereof certain money, stocks and conveyances referred to in the contract. If, however, you do not make such sale within that time you must convey to us inter alia the West Brooklyn claim."

The terms used in the contract with reference to the sale to the Copper Company was "consummate." Technically the word consummate means to complete, but what were the parties to consummate or complete according to this contract? It was the sale of the

West Brooklyn claim to the Copper Company. Now, how is a sale completed? It is necessary that the pur- purchase price be paid and the property conveyed so that there is absolutely nothing left to be done between the parties; or is a sale completed or con-
77 summated when the parties have entered into a valid and binding contract for that purpose? If I enter into a contract to sell a lot for $1,000, $100 cash and the balance in one, two and three years, and the grantee signs the contract and pays the money, have I sold my lot in the ordinary acceptance of the term? I think so. The payment of the balance of the purchase money and the execution of the necessary conveyances are but the carrying out of the contract of sale already made. I am therefore of the opinion that if the defendant, at any time after the 27th day of August, 1907, and up to January 1, 1908, had entered into a contract with the United Verde Copper Company to sell them the West Brooklyn claim for $10,000, the deal would have been consummated within the meaning and language of the contract, and the intention of the parties. But what is the situation here? The title had not been conveyed. A deed was tendered, but was refused by the Copper Company, and sent back to their attorneys with instructions not to bind them to pay the purchase price until the title was perfected. No contract other than the option above referred to has ever been entered into between the defendants and the Copper Company. The situation today, so far as taking up the option is concerned, is precisely the same as it stood on the 27th day of August, 1907. The evidence shows no existence of the option beyond January 1st,
78 but assumes that it is still outstanding; the situation is that the Copper Company have a right to purchase the West Brooklyn at $10,000, but they have not exercised that right and have not purchased it, and may never do so, as they can not be compelled to accept the option. The contingency then upon which depended the release by the Brooklyn Company of its claim to the title to the West Brooklyn did not happen prior to January 1, 1908, nor has it happened yet. If I am correct in this, it follows from the clear expressions of the contract that the Brooklyn Company is entitled to a conveyance of the West Brooklyn claim, and it is immaterial in the determination of that question whether the option expired on the first day of January, or whether it is still in force. In the latter event the Brooklyn Company simply succeeds to the rights and interests of the Millers under the option.

I do not deem it necessary to discuss the legal effect of the deposit of the deeds with Norris & Ross. It is entirely probable that the Millers expected, beyond doubt, that within the time specified they would be able to make a sale of the claim to the Copper Company. The deposit of the deeds with Norris & Ross clearly indicate this. It was an attempt on the part of the Millers to carry out the contract in question on the supposition that the Copper Company would take the claim, but whatever expectations they had in
79 that regard are not controlling here because the very contingency upon which they depended did not happen.

But it is stated that the failure to complete the deal with the Copper Company was due to the fact that the plaintiff had failed and

refused to dismiss its case in Arizona, whereby it sought to produce a conveyance of the West Brooklyn from the Millers to itself; that the contract recited "in consideration of the dismissal and settlement," etc., of the claims in these respective suits, the parties entered into this agreement. The fact is, as shown above, that neither of the cases pending in Arizona were dismissed prior to January 1, 1908, and in view of the situation of the parties, it seems to me it was altogether proper to permit those suits to remain on the docket until the time arrived when the rights of the parties were definitely fixed according to the terms of the contract. No time was stated when the suits were to be dismissed, and the parties evidently took the view above expressed with reference to that question.

But, how could the pendency of these cases prevent the completion of a sale under the option in the view I have taken of the meaning of the term "consummate" I am unable to perceive. At any time before the first of January the defendants might have completed the contract of sale with the United Verde Copper Company, and its rights in or title to the West Brooklyn could not by any
80 possibility have been affected by the pendency of these suits.

It was further contended that an allowance of a decree for specific performance rests in the discretion of the Court, and it will not be exercised in doubtful cases. This is, no doubt, a correct statement of the principle, but the discretion referred to is a sound legal discretion, and if the plaintiff has a fair legal right to the performance of the contract, and the enforcement of that right will not violate any equitable principle, or, in other words, if the enforcement of a legal right is not unconscionable, the discretion of the chancellor is not invoked, and it is not the duty of the Court to enforce the contract of the parties as made. I am clearly of the opinion that both parties to this contract understood its meaning to be that if the Copper Company did not buy the West Brooklyn, either by entering into a valid contract for its purchase, or accepting a conveyance of the claim, by January 1, 1908, the defendants gave up all their claim to it and agreed to convey it to the plaintiff.

There are only two defendants served in this proceeding, Ada Miller and G. B. Lesbury. Ada Miller is the widow of Alonzo V. Miller, who died in November, 1907, and one of his heirs. The other heirs are his sons Charles and George, who are not served. The defendant Lesbury, as above recited, has executed a conveyance of all of his interest in the West Brooklyn to the Millers in
81 December, 1906. Charles C. Miller, the other party in interest in the West Brooklyn is not served. The reason for failing to serve these defendants is that they are non-residents of the state of Nebraska, and could not be served here. And it is suggested under these circumstances it would be improper to enter a decree of specific performance. As to Lesbury, while his interest in the West Brooklyn has apparently ceased, he has filed no disclaimer herein, nor set up that fact, but defends with Mrs. Miller as a party in interest, and must in consequence stand the burden of any decree which may be rendered. While it is true that the entire case, regardless of the residence of the parties, could be determined

in the action in Arizona where the real estate in controversy lies, still I see no valid objection to determining here the rights of the parties subject to the jurisdiction of this Court.

There will be a decree for the plaintiff as prayed, for the enforcement of the alternative part of the contract in suit.

(Endorsed: Filed March 25, 1909.)

Decision of the Court.

[Title of Court and Cause.]

As I construe the agreement of August 27th, it is a binding contract between the parties, containing mutual obligations which may be enforced according to its terms.

82 Plaintiff seeks a decree of specific performance upon the theory that the defendants have failed to carry out one of the essential obligations required of them by the contract, namely, the obligation of the sale of the West Brooklyn mining claim to the United Verde Copper Company on or before January 1st, 1908.

It is axiomatic that before either party to a contract may obtain specific performance against the other he must show that he has in good faith done all that the contract requires of him, or has offered in good faith to do all that the contract requires of him.

It is shown by the evidence and clearly appears therefrom that no sale was consummated by defendants with the United Verde Copper Company of the West Brooklyn mining claim on or before January 1st, 1908. On the face of the record, therefore, it appears that the defendants have failed to carry out one of the terms of the agreement. It becomes necessary, therefore, to determine whether the plaintiff is in a position to enforce as against the defendants the performance of the conditions named in the agreement and which, by its terms, were to be performed by the defendants in the event such sale should not have been made on or before the date mentioned.

I regard the dismissal of the action which had been brought by the plaintiff against the defendants, and which was pending

83 at the time the agreement of August 27th was entered into, as binding and obligatory upon the plaintiff. The agreement was a complete settlement between the parties of all antecedent disputes and claims, and it cannot be inferred from the agreement that the pending suits were to be continued, for the agreement is absolute that they should be dismissed. It appears that the suit brought by the plaintiff, and which was pending at the time the agreement was entered into, involved the title to the West Brooklyn mining claim. It also appears from the record that this suit was not dismissed until February 15th, 1908, the day on which this action was brought. It also appears that the defendants, prior to January 1st, 1908, were endeavoring to effect the sale to the United Verde Copper Company, and by the testimony of Will L. Clark it is established that the pending litigation prevented such sale. It also appears from the testimony of Clark that the United Verde Copper

Company has been ever since willing to make the purchase at the price of $10,000.00, or its equivalent.

I therefore conclude that the plaintiff is not in a position to enforce, at this time, specific performance on the part of the defendants, for the reason that it was in itself at fault in not dismissing its litigation and thus removing any obstacle in the way of the defendants negotiating and consummating a sale of the West
84 Brooklyn mining claim on or before January 1st, 1908. Before specific performance will be granted the plaintiff must show an undoubted right based upon some specific agreement or contract, and that he has not in any way, by his own default or conduct, placed any obstacle in the way of the defendant preventing the latter from carrying out his agreement. It would be inequitable to compel the defendants to suffer the consequences resulting under the agreement from their failure to make a sale when the plaintiff by its failure to do that which the contract required of it in any way prevented or hampered the defendants in consummating such sale. It is true that before the complaint in this case was filed, the suit involving the title to the West Brooklyn mining claim had been dismissed. It is likewise true that sufficient time was not given the defendants thereafter to make the sale. The cause, therefore, is analogous to one where a forfeiture is claimed under a contract and sought to be enforced by plaintiff where it appears that relief should be granted defendant against such forfeiture by reason of some act or omission on the part of the plaintiff. In such a case courts of equity will not enforce a forfeiture but will give the defendant an opportunity to comply with the requirements of the agreement before such forfeiture be declared.

As all the parties are before the Court, and the agreement is regarded by both parties as still in force and effect, and as the
85 sole question in issue is whether or not the defendants are in default in carrying out an essential provision of the agreement, I am of the opinion that the Court should not dismiss the action, but, following the practice familiar to courts of equity where relief against forfeitures are had, should grant to the defendants a reasonable time to consummate the sale of the West Brooklyn mining claim to the United Verde Copper Company. Under the circumstances disclosed I consider ninety days a reasonable time.

The judgment of the Court will, therefore, be that an Interlocutory Order and Decree shall be entered that if the defendants shall, within ninety days from this date, consummate a sale of the West Brooklyn mining claim to the United Verde Copper Company, and shall pay over or tender to the plaintiff all moneys and stock which the contract provides shall be paid by the defendants to the plaintiff in the event of such sale, then in such event the action shall be dismissed and the defendants go hence without day; but that in the event such sale be not consummated by the defendants to the United Verde Copper Company within such time then a decree shall be entered requiring them to make the conveyance of the mining claims mentioned in the agreement as therein provided.

(Signed) RICHARD E. SLOAN, *Judge.*

(Endorsed: Filed April 24, 1909.)

86 *Decree and Judgment.*

[Title of Court and Cause.]

This cause came on regularly to be heard on the 25th day of March, 1909, plaintiff appearing by John J. Hawkins and T. C. Job, Esqs., its attorneys, with F. S. Howell of counsel, and defendants, Charles C. Miller, Ada M. Miller, Charles C. Miller No. 2, and George Miller, a minor, by Charles C. Miller No. 2, his guardian ad litem, appearing by Reese M. Ling, Esq., and Messrs. Norris & Ross, their attorneys.

A jury being expressly waived by both parties, the cause was tried to the Court upon plaintiff's amended and supplemental complaint, the amended answer and cross-complaint of defendants, Charles C. Miller, Ada M. Miller, Charles C. Miller No. 2, and Charles C. Miller No. 2 as guardian ad litem of George Miller, a minor, and plaintiff's reply to said amended answer and cross-complaint, together with said defendants' motion to strike, and replication addressed to said reply. Evidence, both oral and documentary, was introduced on behalf of the respective parties and the parties rested, and the cause was submitted to the Court for its decision and judgment. Thereafter it was argued to the Court by counsel of the respective parties through written briefs.

87 The Court having considered the evidence in said cause, the argument of counsel and the principles of law and equity applicable thereto, and being fully advised in the premises, on the 24th day of April, 1909, made and filed its written decision herein, and ordered that a judgment and decree be entered in accordance therewith.

Now, therefore, for the purpose of giving defendants an opportunity to consummate a sale of the "West Brooklyn" mining claim to the United Verde Copper Company, or make a binding contract for such sale, free and clear of all claims and litigation on the part of plaintiff touching or questioning said title and in accordance with said written decision, and for the purpose of fully determining the rights of the parties hereto under the contract sued upon, an alternative decree is hereby made and entered herein as follows, to-wit:

(1) That within thirty (30) days from the date hereof, plaintiff shall file herein its written consent that this decree, conditional upon a sale of the "West Brooklyn" mining claim to the United Verde Copper Company, as hereinafter provided, shall become final, irrevocable and non-appealable, and consenting that said defendants, within the time hereinafter stated, may make a sale, or a binding contract therefor, of the "West Brooklyn" mining claim to the United Verde Copper Company, free and clear of all claims and litigation on the part of plaintiff questioning or affecting the title to said claim.

88 (2) That if plaintiff shall fail or refuse to file herein within said period of thirty days from the date hereof its

written consent and waiver, as provided herein, then and in such event, plaintiff's action herein shall stand dismissed as of this date and plaintiff shall take nothing thereby.

(3) Ordered, adjudged and decreed that if within ninety days from the date hereof said defendants shall consummate or make a binding contract for the sale of the "West Brooklyn" mining claim to the United Verde Copper Company and shall deliver and pay over, or tender, to plaintiff herein the money, stocks, deed, and proof of assessment work which it is provided by the contract of August 27, 1907, shall be paid over and delivered by defendants to plaintiff, then and thereupon this decree shall forthwith become final, irrevocable and non-appealable as of this date, and plaintiff shall be forever barred and estopped to claim any right, title or interest in or to said "West Brooklyn" mining claim.

(4) Ordered, adjudged and decreed that if plaintiff, within the period aforesaid, shall file its said written consent and waiver as above provided, and defendants shall fail to make such sale or binding contract therefor to the United Verde Copper Company and to pay over and deliver, or tender, the money, stocks, deed, and
89 proof of assessment work aforesaid, within said period of ninety days, then and thereupon defendants shall forthwith execute and deliver to plaintiff a valid and sufficient deed, conveying to plaintiff all their right, title and interest in and to the "West Brooklyn" mining claim, as mentioned and provided in said agreement of August 27, 1907; and said agreement shall be fully carried out by all the parties hereto.

(5) Ordered, adjudged and decreed, that plaintiff is not entitled to have or recover anything herein under, by virtue, or by reason, of, that certain decree described in plaintiff's reply to defendants' cross-complaint herein, rendered by the District Court of Douglas County, State of Nebraska; that the Commissioner's deed made under and pursuant to said decree, is void and of no force or effect, and that said deed does not constitute a cloud upon the title to the "West Brooklyn" mining claim.

(6) Ordered, adjudged, and decreed, that plaintiff is not, in any event, entitled to any accounting herein or to have or recover in this action on account of silica heretofore sold or shipped by defendants or any of them from the "West Brooklyn" mining claim; and defendants shall have and recover from plaintiff their costs herein taxed at $37.35.

Done in open court this 24th day of April, 1909.

RICHARD E. SLOAN, *Judge.*

(Endorsed: Filed May 1, 1909.)

90 *Motion for a New Trial.*

[Title of Court and Cause.]

Comes now the plaintiff in the above entitled action and moves the court for a new trial on the following grounds, to-wit:

I.

The Court erred in the trial of said cause in admitting evidence in behalf of defendants duly objected to by the plaintiff.

II.

The Court erred in rejecting evidence offered by the plaintiff and objected to by the defendants.

III.

Upon the ground that the evidence does not sustain the decision and judgment of the Court.

IV.

The judgment of the Court is contrary to law and equity.

V.

That the evidence does not sustain the judgment and decree of the Court.

VI.

The Court having failed to make any findings of facts
91 upon which to base the decree, it appears from the evidence that the same is insufficient to sustain the decree, and the said decree is contrary to law and the evidence in the case.

VII.

That the decision of the Court made and filed herein on April 24th, 1909, provides that "an Interlocutory Order and Decree shall be entered that if the defendants shall, within ninety days from the date of such decree, consummate a sale of the West Brooklyn mining claim to the United Verde Copper Company, and shall pay over or tender to the plaintiff all moneys and stock which the contract provides shall be paid by the defendants to the plaintiff in the event of such sale, then in such event the action shall be dismissed and the defendants go hence without day; but that in the event such sale be not consummated by the defendants to the United Verde Copper Company within such time then a decree shall be entered requiring them to make the conveyance of the mining claims mentioned in the agreement as therein provided," whereas, such Interlocutory Order and Decree was not made and entered by the Court, but the Court upon the same date, to-wit: April 24th, 1909, made and entered a final decree herein which is contrary in its provisions and in its effect to the decision aforesaid.

92 VIII.

That the judgment and decree of the Court purporting to be a final judgment and decree entered herein on April 24th, 1909, is erroneous in this, to-wit: that the provisions of the decree require of the plaintiff to file its written consent which would operate as an estoppel of its right to appeal, and does not prevent the defendants from appealing in case such written consent of plaintiff is filed.

IX.

That the said judgment is further erroneous in this, to-wit: that it undertakes to compel the plaintiff to be bound by its decision and judgment without giving the right to appeal therefrom.

X.

That the decree and judgment of the Court ignores the force and effect and holds for naught the judgment and decree of the District Court of Douglas County, Nebraska, in an action therein pending wherein this plaintiff was the plaintiff, and Ada M. Miller and George B. Lasbury, two of the defendants herein were defendants, and in which the same matters were adjudicated as to said two defendants as were at issue in this case concerning said defendants, and plaintiff was entitled in this action to the relief granted it by
93 said District Court of Douglas County, Nebraska, against said defendants Ada M. Miller and George B. Lasbury.

XI.

Said judgment and decree is further erroneous in this, to-wit: that it imposes a penalty on plaintiff that if it shall fail within thirty days to file written consent as therein provided, it shall take nothing by the said decree and this action shall be dismissed, thus denying the plaintiff any right of appeal concerning any matters whatsoever at issue herein and shown by the evidence, and also depriving plaintiff of its right to receive the benefits of the tender, and deed, not only of the West Brooklyn claim but of all of the other mining claims mentioned in the complaint, and also depriving it of all moneys and stock heretofore admitted by defendants as due and owing plaintiff under the contract sued on.

XII.

The said decree is further erroneous for the reason that plaintiff is barred and prevented thereby from any recovery from defendants, or an accounting on account of the silica sold or shipped by defendants or any of them, from the West Brooklyn mining claim, which question of accounting and recovery was not litigated in this action, but

was expressly dismissed by plaintiff without prejudice, and
94 no evidence whatever was introduced at or during the trial of said cause concerning said accounting, and said part of said decree is based upon no evidence whatever and is clearly made to the prejudice of plaintiff's right to sue for an accounting.

XIII.

The judgment and decree of the Court is contrary to law, evidence, and to equity, and should have been in favor of plaintiff.

Wherefore, plaintiff prays that the judgment and decree be set aside and a new trial be granted herein.

JNO. J. HAWKINS,
THOMAS C. JOB,
Attorneys for Defendants.

F. S. HOWELL,
Of Counsel.

(Endorsed: Filed Apr. 24, 1909.)

Minute Entries of the Trial Court.

[Title of Court and Cause.]

February 20, 1908:
This cause coming on for hearing upon the application of plaintiff for a writ of injunction, supported by affidavits, and upon counter affidavits, John J. Hawkins and Thomas C. Job, Esqs., appearing for plaintiff, Norris & Ross appearing for defendants, the Court, considering the affidavits presented and hearing the argument of counsel, denies the writ.

95 November 5, 1908:
Case set for trial January 22, 1909.

November 6, 1908:
Comes plaintiff by counsel, Thomas C. Job and J. J. Hawkins, Esqs., and moves the Court for a continuance, which was argued by counsel, Norris & Ross appearing for defendants, and the motion was denied. Case set for trial December 22, 1908.

December 14, 1908:
On motion of Norris & Ross, counsel for defendant, this case is set for trial December 23, 1908.

December 22, 1908:
Plaintiff's motion for continuance coming on for hearing, Thomas C. Job and J. J. Hawkins, Esqs., appearing for plaintiff, Norris & Ross appearing for defendant, the Court, considering the motion and affidavits, orders that trial herein be continued to March 1, 1909, and that costs of continuance be taxed to plaintiff.

March 13, 1908:

Comes now John J. Hawkins, attorney for plaintiff, Norris & Ross, attorneys for defendants, also come. On motion of John J. Hawkins, Esq., and by agreement of defendants, C. C. Miller No. 2, is hereby appointed guardian ad litem of George Miller, a minor, defendant herein. By consent, the trial of this cause is set for Wednesday, March 25, 1909.

96 March 25, 1909:

This cause coming on for trial, the plaintiffs appeared by counsel, J. J. Hawkins and Thomas C. Job, Esqs., and the defendants appeared with their counsel Norris & Ross. Now on motion of J. J. Hawkins, Esq., it is ordered that the name of F. S. Howell, of Omaha Bar, Nebraska, be and the same is hereby entered as of counsel for plaintiff in this proceeding, and now upon motion of Norris & Ross it was ordered that the name of R. M. Ling, Esq., be entered herein as of counsel for defendants.

This cause came on to be heard upon the defendants' motion to strike and demurrer to plaintiff's answer to defendants' cross-complaint, and the Court, having heard the argument of counsel, reserves his ruling.

Upon agreement of counsel, in open court, it is ordered that the reply of plaintiff, filed herein March 23, 1909, to the amended answer and cross-complaint of Chas. C. Miller, Ada M. Miller, and Chas. C. Miller No. 2, filed February 8, 1909, shall be considered and treated as a reply to the amended answer and cross-complaint of the above named defendants and of Chas. C. Miller No. 2 as guardian ad litem of defendant George Miller, a minor, filed herein on March 25, 1909.

The cause coming on for trial, witness J. C. Bradbury was sworn and testified for plaintiff, and documentary evidence, to-wit:
97 record of location notices of mining claims of Brooklyn Mining & Milling Company, was offered and admitted on behalf of plaintiff. Witness M. B. Hazeltine was sworn and testified on behalf of plaintiff, and documentary evidence, to-wit, letters, drafts, receipts, checks, etc., offered and admitted on behalf of plaintiff; and documentary evidence, to-wit: deposition of Chas. J. Collins, Thomas H. Ensor, and Edward W. North, was offered and admitted on behalf of plaintiff. Witness Chas. W. Pearsall was sworn and testified on behalf of plaintiff, and further hearing continued to 9:30 A. M., Friday, March 26, 1909.

March 26, 1909:

The trial of this cause having been continued to this day, the respective parties appeared in court by counsel, J. J. Hawkins, Thomas C. Job, and F. S. Howell, Esqs., appearing for the plaintiffs, Norris & Ross & R. M. Ling, Esqs., appearing for the defendants, and further proceedings on trial of cause were resumed. Witness Chas. W. Pearsall was recalled and testified for plaintiff, and witnesses M. L. Buckley and J. C. Bradbury were sworn and testified on behalf of plaintiff. Comes now the plaintiff and by consent of the court, in open court, dismisses out of its complaint, the allega-

tions therein, and the prayer for relief, with reference to an
98 accounting without prejudice, and the court grants such relief. Witness Chas. C. Miller, the defendant, was called and testified on behalf of the plaintiff, and witness Ada M. Miller, one of the defendants, was sworn and testified on behalf of plaintiff, and plaintiff rested.

Witness Chas. W. Bennett, Deputy Recorder, was sworn and testified for defendants, and documentary evidence, to-wit contract, and deposition of C. C. Miller et al., in case at Omaha, Nebraska, and, by stipulation, certain records, were submitted on behalf of defendants, and further proceedings on trial were continued to 9:30 o'clock A. M., March 27, 1909.

March 27, 1909.

The trial of this cause having been continued to this day, the respective parties appeared in court with their counsel, J. J. Hawkins, Thomas C. Job and F. S. Howell, Esqs., appearing for the plaintiff, Norris & Ross and R. M. Ling, Esqs., appearing for the defendants; thereupon proceedings on trial were resumed. Witness Thomas C. Job was sworn and testified for plaintiff. Witness Charles W. Pearsall was recalled for cross-examination by defendants, and witness Chas. C. Miller was recalled for defendants, and defendants rested. The cause was submitted to the court with leave to counsel to file briefs, plaintiff to file brief by April 4, 1909, defendants to file reply brief by April 10, 1909.

99 April 24, 1909:

This cause having heretofore been tried and submitted to the court for consideration and decision, and the court having considered the matter and being fully advised in the premises, the defendants being present in court by counsel, Norris & Ross, the plaintiff not being represented in court, it was agreed and stipulated in open court by the defendants that all of the rights of the plaintiff upon the rendering of a decision herein should be granted and protected, thereupon the court delivers its findings and orders that an interlocutory decree be entered herein in accordance with said findings.

Comes now the defendants and file their motion for a new trial herein, which motion is submitted to the court and overruled, to which ruling of the court in denying said motion for a new trial defendants except, and give notice in open court of appeal to the Supreme Court of the Territory of Arizona from the order overruling motion for new trial, from the judgment rendered herein, and from the whole thereof.

Comes now the plaintiff and files its motion for a new trial herein, which motion is submitted to the court and overruled, to which ruling of the court in denying said motion for a new trial plaintiff excepts, and gives notice in open court of appeal to the Supreme Court of the Territory of Arizona from the order overruling
100 motion for a new trial, from the judgment rendered herein, and from the whole thereof.

June 9, 1909:

On motion of plaintiff, defendant consenting, sixty days' additional time is allowed in which to file bill of exceptions.

Evidence of Plaintiff.

(Figures in parentheses refer to page of Reporter's transcript).

Testimony of J. C. Bradbury, County Recorder.

Direct examination:

Certain records of the Recorder's office of Yavapai County, Arizona, showing certain notices of location and conveyance of certain mining claims in the Big Bug Mining District, Yavapai County, Arizona, were introduced, proved by the witness, and admitted in evidence, to-wit:

Location notices as follows:

West Brooklyn, Book 67 of Mines, page 408, located March 17, 1903, by T. H. Ensor, G. B. Lasbury, A. V. Miller, and C. C. Miller. East Brooklyn, Book 67 of Mines, page 407, located March 17, 1903, by T. H. Ensor, G. B. Lasbury, A. V. Miller, and C. C. Miller.

South Brooklyn, Book 67 of Mines, page 406, located March
101 17, 1903, by T. H. Ensor, G. B. Lasbury, A. V. Miller, and C. C. Miller. North Brooklyn, Book 78 of Mines, page 267, located November 26, 1906, by C. C. Miller, A. V. Miller, and George B. Lasbury. Midway, Book 78 of Mines, page 265, located November 26, 1906, by C. C. Miller, A. V. Miller, and George B. Lasbury. Empress, Book 78 of Mines, page 266, located November 26, 1906, by C. C. Miller, A. V. Miller, and George B. Lasbury.

Deed: Dated August 30, 1906, from Thomas H. Ensor to G. B. Lasbury, acknowledged August 30, 1906, and recorded September 18, 1906, in Book 72 of Deeds, page 536, conveying East Brooklyn, South Brooklyn, and West Brooklyn claims. (7-10).

Testimony of Charles W. Pearsall.

Direct examination:

I am and since January, 1908, have been President of Brooklyn Mining and Milling Company, and have conducted its affairs as President and active manager. I have resided at Omaha, Nebraska, for twelve years. I am acquainted with defendant Ada M. Miller. She was a resident of Omaha on January 28, 1908, and for more than two months after that. I am acquainted with George B. Lasbury. On January 28, 1908, and thereafter, he resided at Omaha.

I know the defendant C. C. Miller, or Charles Miller. On
102 January 28, 1908, and thereafter he resided at Dewey, Arizona. I know the other defendants and the children of Alonzo V. Miller and Ada M. Miller. On January 28, 1908, George

Miller resided in Nebraska. Charles C. Miller No. 2 was not in Nebraska. George Miller and Ada Miller were not in Omaha on January 28, 1908; he was in Dewey, Arizona. (10-12). Witness then stated that he was present at the taking of some testimony of Charles C. Miller in Prescott, Arizona, during the month of August, concerning evidence given by him in a suit pending in Omaha, Nebraska, wherein the Brooklyn Mining and Milling Company was plaintiff and C. C. Miller et al. were defendants, involving the same contract in litigation here. On being asked what was said by witness Miller, the Court sustained the objection of defendants, holding that the deposition being taken in writing, it was the best evidence. Whereupon W. S. Norviel, the Court reporter who took said testimony, was called and sworn as a witness for plaintiff and testified in substance as follows:

Testimony of W. S. Norviel, Court Reporter.

Direct examination:

I recognize Exhibit C, consisting of 42 pages, commencing
103 at page 11 with the words "C. C. Miller, of lawful age, a witness," etc., and continuing and including page 49, and attached to the stipulations Exhibits A and B, as the testimony of C. C. Miller, taken by deposition by reason of the said stipulations Exhibits A and B, on August 27, 1908, at the office of Norris & Ross.

"By Mr. NORRIS: We admit that.

"By Mr. HOWELL: It is stipulated that the testimony referred to was taken pursuant to Exhibits A and B identified by this witness."

Exhibit C is a correct transcript of the evidence given at that time. The stipulations and attached deposition were offered and admitted for the purpose of showing statements made by C. C. Miller with reference to the sale of the West Brooklyn mining claim to the United Verde Copper Company, and were marked respectively Exhibits "A," "B," and "C." (18).

CHARLES W. PEARSALL, recalled.

Direct examination:

"By Mr. HOWELL: Mr. Pearsall, please hand the paper you have in your hand to the reporter and have him identify it as Plaintiff's Exhibit D.

Q. I will ask you to state if that is the original contract in suit.

A. That is the original contract. (Contract offered and marked Plaintiff's "Exhibit D.") The interlineations on the second
104 and third page were made previous to signing. I had a conversation about December 26th and also about the 29th or 30th of December with the defendants Ada Miller and George B. Lasbury in Omaha, Nebraska. The first conversation was with

Lasbury on December 26th over the phone. I was at my office and he was at his. (19). I knew who I was talking to.

Q. State the conversation, that is, the one with reference to Mr. Lasbury over the phone?

A. I called Mr. Lasbury up on that day and asked him what he knew about the deal going ahead between the United Verde and himself and the Millers. He said: "C. C. writes me that the deal is off."

By Mr. Ross: We object to that and move that it be stricken out.

By the COURT: The objection is sustained to that. It is stricken out. (22).

Q. Tell the balance of the conversation?

A. That Senator Clark refused——

By Mr. Ross: We object.

By the COURT: Is that a part of what Lasbury said he heard from C. C. Miller?

A. No, your Honor, the part he stated he received from C. C. Miller was that "C. C. writes that the deal with Senator Clark was off." Whether he gave the balance as his own knowledge, or whether C. C. wrote it or not, I am unable to differentiate it.

By the COURT: The objection is sustained.

105 I had a subsequent conversation the day following in my office. No one else was present. Lasbury came in and said, "Charley, that deal with the United Verde is entirely off. Senator Clark won't take the property because of the hard times, he don't want to incur any further expense. I have just come up to see whether you folks won't accept the stock alone and throw off the cash payment." I said, "No, George, according to my present information I won't do that." I said, "Come around again Sunday morning and I won't be so busy and we will talk it over again." (23). I was busy in my office transcribing. I had a subsequent conversation with him Sunday morning, December 29, 1907. It was the Sunday immediately succeeding Christmas. That was in my office. He came in response to my suggestion that he come up again Sunday morning. That conversation was very short. I said, "George, I don't care to discuss this matter any further, and in order that there may be no mistake as to our position in the matter I have written down here on this paper all that I have to say, you can read it or do with it as you please." I handed him that paper, which he sat there and read. I have that paper somewhere in town. I have looked for it but can't find it. (24). I will look for it again. There is a copy of it here taken by the reporter in Omaha.

106 He handed it back to me and said, "I am not deceiving you, this deal is absolutely off." I said, "Well, I haven't anything further to say, George, that is all there is to it." I had another conversation with him the following day, Monday, I think that was the 30th day of December, 1907. No one was present at any of the preceding conversations except myself and Lasbury.

This conversation I am speaking of now was during the noon recess of the Federal Court at noon on Monday. It took place in Court Room No. 1 of the Federal Court. Mrs. Ada M. Miller and Edward North, George B. Lasbury and myself were present.

Q. State what that conversation was, and as near as you can give it, all the different phases of the conversation, whether by yourself, Mrs. Miller or Lasbury, and give us what occurred there? (25).

A. Mrs. Miller and Mr. Lasbury came in together and came up and took seats in the juror's chairs. I was sitting at the reporter's table. Mr. North was next to me. Mrs. Miller said: "We have come up to see if we can't make some different arrangements with you about this matter of ours. Senator Clark is not going to take claim because of the hard times. I think you hadn't ought to ask for this $3,000.00. I think you ought to be satisfied to take the stock and let that be enough." She says: "We can't raise that $3,000.00 unless we go to the bank and borrow it. That is not possible at this time." Mr. Lasbury spoke up and said: "No,
Charley, you know it is absolutely impossible to borrow
107 money at this time. If we ever do make this sale we will
give you a bond that we will give you the same amount of money we are to give you now if the sale was made." I says: "I am awful busy in the middle of a case. Why can't you come around Thursday or Friday and talk it over?" Mrs. Miller spoke up and said: "Because if we don't make this sale before the first of January we are in duty bound to make a deed to you for this property." Lasbury spoke up and said: "Then we will have to dance to your music." I said: "I don't think it would hurt you any. I have been dancing to your music." I said: "The only thing I heard about it was that Mr. Ross told Mr. Job it was doubtful if Mr. Clark would take this claim."

By Mr. Ross: We object to that, what I said to Mr. Job.

By the COURT: As a part of the conversation only.

By the WITNESS: Mrs. Miller said: "Mr. Pearsall, don't you believe me, what I said about the deal being off? I don't want any courts, but I am willing to go before a Notary Public or a Judge and make an oath if that will satisfy you." I said: "That is not necessary." She said: "Lon left this to me and I am going to take the boys and go down there and settle down and try to make some income from it." The statement was repeated that if they did not
make this arrangement that they were in duty bound to deed
108 it over after the first of January. I said: "I don't want to
make any other arrangements now." They got up and left and Mr. North left in a few moments and I was left alone. (29-30). The North mentioned is the North whose deposition is in this case. He lived in Omaha, Nebraska, and was there when I left last Saturday. He is not in this Territory. Mr. Collins resides in Lena, McPherson County, Nebraska. I believe he is now in South Omaha; he was when I left there. Thomas H. Ensor is a physician and surgeon, practicing and residing in South Omaha, Nebraska. Collins and Ensor are the gentlemen whose depositions are on

file in this case in this court. I had a subsequent conversation with Mrs. Miller and Mr. Lasbury the morning of January 8, 1908. I called George up over the telephone, he answered, and I said: "George, my attorney wires me from Prescott that you folks came into court and put up the money in that matter. Where did you get it? I thought you could not find any." He said: "I don't know anything about it, you have got your money, what is the difference?" I said: "No, I haven't got it and will not accept it." I said: "George, what is there about that property that you have claimed to be so unprofitable to you, that you want it so badly?"

By Mr. Ross: We object to this statement, to the argument over the telephone.

109 By the COURT: Yes, any statement why he desired it is not proper testimony.

By Mr. HOWELL: It is difficult to separate the conversation. The Court is not going to be led astray.

Q. Well, Mr. Pearsall, without giving any further conversation along the line the Court excluded, state if there was any further conversation then than this, and if so, what it was? (31).

A. He said: "Well, Charley, you know very well we have another claim we are trying to sell to Senator Clark. If we have to make this deal we must have the West Brooklyn to make that deal." I said: "George, if you will turn that claim over now——" "I will agree that we will not sell that claim until this can be sold a'so." He said: "Young man, you might just as well understand that you will never get that property." I said: "I will or we will know the reason why," and hung up the telephone. And that is all there was to it. I believe I had no subsequent conversation with him concerning this transaction other than those already given, until during the trial last December, just a word or two in the court room. I had a little conversation with him previous to the conversation on December 26th concerning the option and the extension of it. That was early in November, 1907. Lasbury called me up on the telephone and told me he had a telegram from

110 C. C. Miller, meaning Charlie Miller. He said: "I had a telegram from C. C. saying Senator Clark wants an extension of the option for two weeks." Then I went down to the office and he showed me the telegram. That was early in November, 1907. I don't attempt to say the exact date.

Q. You may now state what Lasbury said to you as to the word he received from C. C. Miller about the deal being off, in one of these conversations you have given, and which the Court excluded. I desire him to state fully. Miller admits in this deposition,—I will read it to you. Speaking now with reference to this transcript: "You and A. V. Miller and Lasbury were also working jointly in these matters, were you not? A. Yes, sir." (33).

By Mr. HOWELL: We offer to show by this witness now on the stand that during the conversation this witness had with Mr. Lasbury on or about the 26th of December, 1907, Mr. Lasbury stated to him—"I have received a letter from Mr. C. C. Miller in which

Mr. C. C. Miller states in substance,—the deal is off,—the deal as to the West Brooklyn Mining Claim is off between the Millers and Lasbury to the United Verde Copper Company."

By Mr. NORRIS: We object to that as hearsay evidence, and that it does not constitute one of the exceptions to the rules that hearsay evidence is not admissible.

111 By the COURT: The objection is sustained.

I have seen Lasbury frequently since the first or second day of January, 1908, but have never talked to him about this matter. He has not talked to me. I have talked to him on other subjects. I have been thrown with him. I have seen Mr. Miller since those days, but have never had any conversation with him about this matter that I recollect of since those dates (36). When I was here in February, 1908, C. C. Miller told me that he had sold, or consummated the sale of the West Brooklyn mining claim to the United Verde Copper Company. None of them claimed previous to that time to have made a sale or consummated a sale to the United Verde Copper Company of the West Brooklyn (37).

Testimony of M. B. Hazeltine.

Direct examination:

I am cashier of the Bank of Arizona, Prescott, Arizona. Have been in that position for ten years or more. We had some correspondence concerning some stock and a deed. I have some of the correspondence from Mr. Lasbury. I don't want them to leave my files. (Papers produced by witness were marked "Plaintiff's Exhibits "E," "F," "G," and "H.") We received Exhibits E, G, and H, being letters, in due course of business through the United
112 States mail (38). They were in the same condition when received as they now are except the pencil memorandums and the receipt of Mr. Miller on Exhibit "H." He signed it. Exhibit "F" was a draft on my bank transmitted to Lasbury through the United States mail and subsequently returned to me marked "Paid." It is now in the same condition it was when returned to me. It was sent through the United States mail to G. B. Lasbury in Omaha, Nebraska. I take the figures 4-30-08 under the signature of C. C. Miller to indicate that the receipt was made on the 30th day of April, 1908, the date of the delivery of the receipt (39).

(Exhibits "E," "F," "G," and "H," with the exception of the memoranda thereon referred to by the witness, and the receipt attached to Exhibit "H" signed by C. C. Miller, were offered and admitted in evidence as Plaintiff's Exhibits "E," "F," "G," and "H," and read into the record).

EXHIBIT "E."

"C. L. Wright. G. B. Lasbury.

Wright & Lasbury, Real Estate.

OMAHA, NEB., *Dec.* 14*th*, 1906.

To Bank of Arizona, M. B. Hazeltine, Prescott, Arizona.

113 DEAR SIR: Enclosed herewith is the deed properly signed and acknowledged which you are to turn over to Mr. Miller on payment of $6000 as per former letter of instructions from United States Nat'l Bank.

I regret very much the mistake made in former deed and don't see how it happened.

Very truly yours, G. B. LASBURY."

EXHIBIT "F."

"$1,586.00. THE BANK OF ARIZONA,
PRESCOTT, ARIZONA, *Dec.* 13, 1907.

Pay to the order of G. B. Lasbury Fifteen Hundred Eighty-six 00-100 Dollars not over $1,600.

The Nat'l City Bank, New York City.

Number 13071.

WM. H. DOYLE, *A. Cashier.*"

Endorsed on the back, by a rubber stamp:

"Pay to the order of American Exchange Nat'l Bank, New York City, Dec. 18, 1907. United States National Bank, Omaha, Nebraska. A. Millara, Cashier."

Also in rubber stamp:

"Received payment through the Clearing House December 20, 1907. Amer. Exc. Nat'l Bank."

Also endorsed in writing: "G. B. Lasbury."

114 EXHIBIT "G."

"C. L. Wright. G. B. Lasbury.

Wright & Lasbury, Real Estate.

DEC. 7TH, 1907.

Cashier Bank of Arizona, Prescott, Arizona.

DEAR SIR: In accordance with instructions from Mr. C. C. Miller of Dewey, Ariz., I herewith enclose certificates Nos. 15-38 & 65 in Brooklyn M. & M. Co. for 53,000 shares of stock for which I am to be paid three cents per share or ($1,590), Fifteen Hundred Ninety Dollars, on receipt of same by you. Attached hereto is his telegram.

Very truly yours, G. B. LASBURY,
504 *South* 16*th Street.*"

EXHIBIT "H."

"C. L. Wright. G. B. Lasbury.

Wright & Lasbury, Real Estate.

OMAHA, NEB., *April 23rd*, 1908.

Bank of Arizona, H. B. Hazeltine, Cash., Prescott, Arizona.

DEAR SIR: Sometime in Dec. 1906, I sent a deed to your
115 bank to be delivered, on certain conditions, to A. V. and C. C. Miller. Please deliver the deed to Mr. C. C. Miller of Dewey on presenting to you by him, or his order, of this letter.

Yours truly, G. B. LASBURY."

On the bottom of that is the following writing:

"Received the mining deed described above,
C. C. MILLER, 4-30-08."

I don't know where the telegram is that is referred to in the letter. I will look for it. We have a copy of the letter we wrote returning an original deed to the United States National Bank in Omaha. The original letter was sent to the United States National Bank at Omaha, through the United States mail. It related to a deed prior to this.

Q. Was that part of the correspondence with these exhibits, relating to the instructions of the United States National Bank of Omaha?

A. Yes, sir. I haven't found it. The original has been sent without the jurisdiction and has never been returned to me. (44).

Thereupon the deposition of Thomas H. Ensor (Plaintiff's Exhibit "I"), and Charles J. Collins (Plaintiff's Exhibit "J"), and Edward W. North (Plaintiff's Exhibit "K"), all taken in this case; the judgment roll of the District Court of Douglas County, Nebraska, Fourth Judicial District (Plaintiff's Exhibit "L"),
116 and the deposition of Will L. Clark in the Omaha, Nebraska case (Plaintiff's Exhibit "M"), were offered and admitted in evidence.

CHARLES W. PEARSALL, recalled:

Direct examination:

I paid to the Clerk of the Fourth District of Douglas County, Nebraska, the $300.00 provided for in the decree. (47). I am acquainted with the relative locations of the various claims described in the pleadings in this suit. The West Brooklyn lies immediately west, that is contiguous, of the Brooklyn claim. The East Brooklyn lies east of and contiguous to the Brooklyn claim. The North Brooklyn lies north of the Brooklyn claim. The Empress lies east of and contiguous to the East Brooklyn. The Midway lies east of and contiguous to the Empress. By contiguous I mean that the east line of the one is the west line of the other.

These claims form one body. The Brooklyn Mining and Milling Company was the owner of the Brooklyn claim at the time this contract was entered into and is still the owner of that claim. I had conversations with the parties who signed the contract with relation to the desirability of having the ownership go to the United Verde. It was prior to the execution of the contract and also at the very time of signing the contract. At the time of signing the
117 contract these conversations were with Alonzo V. Miller and George B. Lasbury, and prior thereto with C. C. Miller, Alonzo V. Miller, and George B. Lasbury at different times. The conversations I mentioned as being prior to the execution of the contract were the third of June and they extended through the holiday week of 1906, at various times so that we may thoroughly understand it, not very close together, up until the time of making the contract. I don't remember of having any conversation with Mr. C. C. Miller concerning that after the holiday week of 1906. (53). The conversation which I particularly recall with Mr. C. C. Miller was during the last part of the holiday week of 1906 at and near Dewey, Arizona. Mr. Miller said to me that they had given an option to the United Verde on the claim; that it would be very advantageous to the Brooklyn Company for them to push that proposition through and for the United Verde to take it; that if the United Verde took it they would develop the property; (54) that it would explore it to a depth of two thousand feet with diamond drills, and lying contiguous to our property it would be in effect the exploration of the Brooklyn claim itself; that the mere fact that the United Verde was operating the property contiguous to ours would, of itself, lend value at least for the promotion of the properties; in fact, he thought it would make the stock worth one
118 dollar a share. I suggested to him that I thought the fact that the United Verde was operating the property next to us would of course be valuable to us, particularly the exploration to a depth of 2000 feet would be very valuable. I disagreed with him that it would raise the value of the stock to one dollar a share, and if he thought so he had better settle up his plans and take what was coming to him out of the stock coming to him. (55). I believed it would materially enhance the Brooklyn Company's holdings. At that time I was acting for the Brooklyn Mining and Milling Company. (56).

Q. Now come back to the next conversation with any of these parties you may recollect, first stating with whom the conversation was had and follow it up with the conversation.

A. I remember that a conversation along the same lines, I cannot attempt to give the exact conversation, it was along that line, of the advantage it would be to us to have the United Verde owning and operating the claim, with C. C. Miller and also with Mr. A. V. Miller.

By Mr. Ross: I wish to object to any detailed conversations with Mr. A. V. Miller for the reason that he is not a competent witness. (57).

By the Court: I will sustain the objection. (60).

Q. Mr. Pearsall, omitting any other conversation for the present with Alonzo V. Miller on the subject under inquiry; take up the next conversation, if you recall and with whom, and state it?

A. Well, the next conversations I had with Mr. C. C. Miller on that subject were during my visit here in October and September, 1907.

By Mr. Ross: We object to that for the reason that it is long subsequent to the date of the contract which was in August.

By the Court: The objection is sustained to any conversations after the execution of the contract. (61).

I had several conversations along the same line with Mr. Lasbury in Omaha a few days prior to the entering into the contract, and again with him during the hour, or half hour in which we were discussing the features of the contract in my office and up to the moment when the contract was finally (63) signed. Mr. Lasbury said it would be an immense benefit to the Brooklyn Mining Company to have the United Verde as a neighbor, as a developer of the claim next to us; that it would go far to corroborate the views we had, and the hopes that we had that the property was situated in a productive district; that it would increase the value of the stock. That is about all. It was not stated in as few words as that, but that is the substance of it as near as I can get to it. (64). At the times of the various conversations I have detailed C. C. Miller, Alonzo V. Miller, and George B. Lasbury were stockholders in the Brooklyn Mining and Milling Company. At the time I signed this contract I fully believed that the purchase of the West Brooklyn mining claim by the United Verde Copper Company would increase the value of our property, of course, a Company like the United Verde taking hold of it.

Q. At that time when you signed the contract on behalf of the corporation, did you sign the same with reference to your beliefs as to the effect of the purchase or sale of the United Verde Copper Company?

By Mr. Ross: We object to that as immaterial and irrelevant. It makes no difference what belief he had when he signed the contract. (65).

By the Court: I will sustain the objection.

By Mr. Howell: We offer to affirmatively answer the question. (66).

"On or about the latter part of September, or the first of October, 1907, in a conversation with C. C. Miller, C. C. Miller in substance stated as follows: "Charley, there is just two ways about this matter now, either this property goes to the United Verde on the first of January or it goes to you Brooklyn people. I would like to have you go up to Prescott and dismiss that suit of yours." I said: "No, Charley, I don't understand that suit of ours is to be dismissed until this deal is consummated. When you get around to that while I am here we will go up to Prescott and fix the matter all up. I came out here for that purpose in case my signature or authority is needed. "George said to me before I came here—" Mr. Buckley was present at that conversation. (67).

Cross-examination:

I first assumed office as President and active manager of the Brooklyn Mining and Milling Company in January, 1906. That Company has carried on some operations in the way of assessment work. It is a matter of contention as to what claims we have, but there is one claim on the record in the name of the Company. I did not do anything on the claims in contention since 1906. I have done something on them. I wouldn't like to state what the object of the suit in this court was. I did not become President until after the suit was brought. It involved the title to the West Brooklyn claim. (68). After I became President, the Brooklyn Mining and Milling Company was substituted as plaintiff.

By Mr. Jos: Which suit do you refer to?
By Mr. Ross: The old suit, 4541.

Yes, to the best of my knowledge it was a substitution of the parties plaintiff. I don't think it was a new suit. That is the suit mentioned and sought to be compromised in the agreement of August 27, 1907. I have detailed fully to the best of my recollection my conversation with Mr. Las-
122 bury during the latter part of 1907. As a result of the conversations I had with Mr. Lasbury and Mrs. Ada M. Miller I was convinced that the deal with the United Verde Copper Company was off. It is not true that I did not believe that they were acting in good faith or telling the truth when they told me the deal with the United Verde was off. Pending these conversations I went to my counsel and had a written statement prepared which I have not introduced and which I handed to Mr. Lasbury. (69.) I was unable to find the statement, I think we have a copy of it. It is found in the transcript of the testimony.

By Mr. Ross: I will read this:

"Pratt says that the safest way is to not complicate matters by trying to make any new deal until the old one is off, either by expiration or written notice of some kind by both parties. I think that is right because we do not want to get into complications which might involve a tangle with a corporation like the United Verde; a very simple matter to them in the way of expense of litigation is a mighty big one to us. I think it would be a mistake on our part to offer to take up the proposition offering us less, immensely less than we have agreed to take in a deal that is still pending. If we did offer to do this it would, as a matter of course, defeat the pending deal with Clark as far as we are concerned. For if Clark
123 still had it in his mind to go ahead with it and complete it, either now or a few days later, there would be no cash in it for the company. We do not even insinuate that this is the plan but the way is open for such a manipulation and we think the company should guard itself against such a contingency. Are you, yourself, so sure that the deal is off that you have recalled your deeds? If you have not done so is it not because you still hope that Clark is only saying that he will not take the property in order to

see if he cannot get a reduction? Has he made any tentative offers of a reduced price?" (70).

That is the written statement I handed Lasbury on, I think, about the 29th of December, 1907. That was not my last interview with him on this subject prior to the second day of January, 1908. I testified to another conversation with him in the Federal Court room the next day when Mrs. Miller was there. That was December 30th. The paper which I handed to Mr. Lasbury stated correctly the position which I assumed in relation to the suggestions from Lasbury and Mrs. Miller about which I have testified. We refused to make any new deal with them. It correctly stated my position as far as it went, it did not state it altogether, I don't suppose. The Pratt referred to in that case is the same Mr. Pratt who acted as one of my attorneys in Omaha. It is not true that at that time and for
124 a long time prior thereto I had been anxious that this contract should not be performed on the part of the Millers. I did not object to the contract until it was brought to my attention that the deal with Mr. Clark was off. When Lasbury told me the deal was off. Then I did not want the people to think they were (71) going to get the property because that was not the contract. I don't know as I was entirely satisfied with the contract. I had made the contract. I always had the idea that if possible I would like to have that property go to the Brooklyn Mining and Milling Company instead of the United Verde Copper Company. At the time I handed this written proposition to Lasbury it was my hope and desire that the United Verde should not purchase that property. I was not willing to do anything I could to prevent a consummation of that deal whatever the purpose of the contract. On December 27th after the conversation with Mr. Lasbury I sent a message to Mr. Job as follows: "Lasbury advised deal with United Verde off. Brooklyn will not sell to Miller nor accept money consideration named in agreement except as compelled to in a bona fide transaction with United Verde as per agreement on date named. Don't want them informed of this in time to hatch conspiracy with United Verde." (72). After my conversation or interview with Mr. Lasbury on Sunday when I
125 handed him this paper and he handed it back to me. I acted on the belief that the deal was off.

Q. You suspected that the deal was off.

A. I didn't expect it was on, I suspected it would be put on. I thought that they were trying to drive a better bargain with me.

Q. You didn't believe the United Verde was going to buy that property,

A. I did believe that. I thought they might possibly be trying to buy it for a less amount than in the contract and asked Mr. Lasbury on that paper if that was so. (73) On December 30, 1907, I sent this telegram to Mr. Job: "Lasbury and Mrs. M. positively assert deal with United Verde off and are seeking to make compromise. I want binding notice that United Verde deal off. They suggested they have Norris give you written notice. If notice that will hold is given wire me." At that time I was not in doubt whether the deal with the United Verde was off. On January 2, 1908, Mr. Job sent

this telegram to me: "Norris made tender in court and filed motion to dismiss. If possible have Millers and Lasbury wire him to withdraw same and wire me copy." In response to that I sent this telegram to Mr. Job: "Somebody else want property. Simply trying to get it for less. Brooklyn not seeking compromise and refuses tender and demands conveyance of West Brooklyn and other property and literal performance of contract." My assumption was that
126 the Millers were trying to get that property for themselves.

(74). Not for the purpose of selling to the United Verde. In the latter part of September or the first part of October, 1907, I had a conversation with Mr. C. C. Miller. At that time I declined to dismiss the suit then pending in behalf of the Brooklyn Company against the Millers under the conditions then existing.

Q. Then your position was that you would never dismiss that suit until the sale was made to the United Verde and that it had to be proved to your satisfaction?

A. It was the word "until" is where I hesitate. I mean not until the sale was made to the United Verde and it must be before the first day of January. I would not say "until" and continue it over into January. I wanted the fact established to me that it was a bona fide sale to the United Verde Copper Company. I stated to Mr. Miller: "I will dismiss that suit when you fellows prove to me that this sale is consummated." I was here for that purpose at that time. That was a great big part of my purpose of coming to Arizona at that time, when that matter closed up. I don't know what I had to do with closing it up. I said to Mr. Miller if my authority or signature was needed for that purpose I was here for that purpose. I did not expect to close it up in September. (75). They said we were to close it up about the first of November or sooner. I was here
127 for the purpose of being here when it was closed, but not with any definite idea that it would be closed. That was about two months prior to the expiration of the contract. I maintained that the suit should not be dismissed until the deal was made. I instructed counsel to take that position. I required the Millers to buy or sell regardless of pending litigation. To state from recollection I cannot be positive that the United Verde was a party to that suit. We did make them a party to one suit, I remember.

Q. You took the position that it was reasonable to require the United Verde Copper Company to pay for that property prior to the dismissal of the suit on your part?

A. I wanted a contract to buy it, one that the Millers might enforce against the United Verde and that the United Verde could enforce against the Millers so that there was a consummated sale. I don't like to split hairs with you on what is my idea of what is a consummated sale. (76). I stated what I thought would be a consummated sale. It would be an agreement on the part of the United Verde to buy that property at a stated price and an agreement by the Millers to sell it to them at that price, an agreement that might be enforced by either party against the other.

Q. I read from this transcript, and I ask you if this is not a correct transcript of the testimony of the case given in Nebraska:

Q. What do you mean by consummated?

128 "A. I mean that there should be an actual bona fide sale made to the United Verde Copper Company that they should take it over and operate it as their own property.

"Q. That is, you mean that the deed should be exchanged and the money paid, is that what you mean by it? A. I mean more than that. I mean that it should be a bona fide sale to the United Verde Copper Company.

"Q. If you will kindly answer the question again;—in the first place you want a conveyance made to evidence the bona fides of the sale, am I right about that matter; that is what you are going to require? A. I don't mean to be bound down to an absolute conveyance, although that would be in my mind an essential, but I want indubitable proof that the deal had been consummated in a bona fide manner.

"Q. The indubitable proof then that you speak of would require a conveyance to be made? A. It would require, amongst other things, a conveyance.

"Q. A transfer of the property by some instrument that would convey the interest that these people had to the United Verde Copper Company? A. Yes sir. (77).

"Q. And the payment of the price? A. Yes, sir."

I testified in accordance with what you have just read. A binding contract would have been indubitable proof to my mind, that is what I wanted. In this testimony by the expression consummated as used in this sentence: "I will dismiss this suit when you fellows prove to me that this sale is consummated," I don't think I was defining what I meant by consummation, I was defining what

129 would satisfy me.

Q. You stated what would satisfy you would be "amongst other things, a deed, the purchase price, and payment." That was included in your understanding of the term "consummated?"

A. Not necessarily in the term "consummated," but I would have been satisfied with those things being done. I don't know as the term would require more. I don't recollect the record. I am willing to say the record is correct. (78).

I would like to have a binding contract that could be enforced by either side on January 1. I mean that the United Verde or the Millers could enforce. I would be satisfied with that showing of the consummation of the sale. I would have been satisfied with such a showing at the time I was talking with the Millers. I don't think you understood correctly that in my direct testimony I stated I had never been notified that the parties were ready to close the contract and sale with the United Verde. I have never been notified. I have never heard at any time that the United Verde was ready to buy and that the Millers were ready to sell. (79). I was present at the taking of the testimony of Mr. W. L. Clark under stipulation. (80). I did not know anything about the position of the United Verde Copper Company that they would not buy that property with a pending law suit affecting the title. There

130 was no mention of the United Verde's position at all. About the holiday season of 1906 I had a conversation with Mr.

C. C. Miller in which he said to me, if the United Verde bought certain benefits would probably accrue to the Brooklyn Mining Company. I think that was the only conversation with Mr. Miller on that subject before the signing of that agreement. It was in December and the agreement was signed in August, but it was not the last I saw of Mr. Miller's utterances on the subject. (81). I merely spoke of a letter he wrote that was exhibited to me. The sale to the United Verde Copper Company was one of the considerations of the agreement. Following my conversation with Mr. C. C. Miller in February, 1907, I did not transmit to the Millers directly the proposition which you now hand me. I handed it to Mr. Lasbury. That is what I handed to him.

By Mr. HOWELL: That is that offer of compromise we have had up before, is it?

A. Yes, sir.

By Mr. Ross: We offer this and ask that it be marked Defendants' Exhibit "1." I will read it.

"OMAHA, *Feb* 9, 1907.

"Chas. W. Pearsall, on behalf of Brooklyn Mining Company offers as a matter of compromise only, this offer to hold good for thirty days from this date, to dismiss suit now pending in 4th
131 judicial district, Arizona, Yavapai County, entitled Pearsall vs. Miller et al. for and in consideration of eight thousand five hundred dollars ($8500.00) cash to be paid to the company on dismissal of said suit, also conveyance to said company of mining claims known as "Midway, Empress, North Brooklyn, East Brooklyn and South Brooklyn, (this agreement in no way recognizing validity of any claim of title in and to said E. Brooklyn and South Brooklyn claims to be in anybody but said Brooklyn Company) also receipt to said company in full for all alleged claims for services or indebtedness of whatsoever nature of C. C. Miller, A. V. Miller and George B. Lasbury, Company to have privilege of removing timbers etc. from shaft of West Brooklyn, Company to waive accounting for silica heretofore removed from West Brooklyn claim. This offer made with the understanding that amount of purchase price of West Brooklyn and White Rock claims is $20,000.00. If purchase price exceeds $20,000.00 this offer is void.

CHAS. W. PEARSALL,
For Brooklyn Mining Co."

Q. Now at that time, Mr. Pearsall; at the time you handed that paper to the defendants, or to one of them; you were convinced from your former conversation with C. C. Miller that the sale to the United Verde Copper Company would be the means of enhancing the value of the company's property and of the company's stock. You also knew that the pending sale referred
132 to in your letter or offer was with the United Verde Copper Company; that is, that the United Verde Copper Company was the prospective purchaser. I will ask you why, (83) under those circumstances, you did not then insist upon the sale to the

United Verde rather than insist upon a certain amount of money payable to the company?

A. The sale to the United Verde was contemplated as fully at that time as it was contemplated later, it was one of the inducements to present that compromise agreement. It was drawn hastily. It didn't take me more than three minutes to write it. I did not present all the agreements in there that were presented fully in the subsequent contract. But it had the same thing in view, the sale to the United Verde which was one of the things we had in view in making that agreement. The reference in Defendants' Exhibit "1" to 'alleged claims of service' on the part of C. C. Miller and others named against the Brooklyn Mining and Milling Company were the basis, or some of them were, as I understand it, the basis of suits subsequently filed by C. C. Miller against the Brooklyn Mining and Milling Company. (84). The suit I mentioned is the suit mentioned in the agreement of August 27th. There was no suit begun at this time but there was a threatened suit.

Q. This agreement recites the pendency of actions, and then,
—I will read this portion: "Whereas it is the desire of the
133 parties connected with the foregoing causes of action to settle same and to adjust the matters of difference between said parties in connection therewith;" "Therefore in consideration of the dismissal and settlement of the foregoing causes of action it is hereby stipulated and agreed by and between the"—parties, etc. Mr. Pearsall, will you state why you refused to dismiss the suit pending then against the Millers prior to the second day of January under that contract?

A. Because I didn't think the contract required it. I understood that they were to be eventually dismissed, of course, whenever the whole matter was consummated. I always thought it would be a concurrent matter, we would both dismiss at once, the rest of the contract being carried out, it would be a matter of concurrent happening. (85). The subsequent proceeding under the suit was a matter for my attorneys to say what would be done. It was beyond the reach of my legal education. The general object of the suit was to make it clear or have the Brooklyn to be the owner of this property according to previous contract. I expected this suit I was holding onto would be automatically dismissed in compliance with the terms of the contract and I still think so. I always intended to enforce our rights under the contract.

Q. Your position would be that that would automatically
134 disappear and you would file another suit on the contract.

A. I never commenced a suit on this contract in that particular way, Mr. Ross, you are going further,—I did not rely on that. (86). I was not obvious to the contingency of litigation with the Millers. I thought we had some rights we had asked for in that suit and did not want to throw them away unless the contract was complied with, then I was ready to comply with our contract at any time the other parties complied with theirs; there was no disposition on my part to hold it off. It did not occur to me at any time that the pendency of the suit would deter the sale of the property. I thought the lis pendens filed would protect what interest

we have against anybody. I contemplated I had surrendered the rights which were supposed to be compromised by this contract when they completed the terms of the contract, that I must of course abide by the terms of the contract.

Q. Now, Mr. Pearsall, the deposit in the West Brooklyn mining claim, so far as you know and so far as anybody knows, I believe, I will confine it to your knowledge, is a silica quarry?

A. Well, I think we have had some assays for other that showed other valuable mineral; I can't recollect positively about that, Mr. Ross, and I won't say positively. Silica is the particular value of the claim. (87). One of its uses, as I understand it,
135 the copper smelters use it to line what they call the copper converters. As far as I know the only use of this particular silica has been converter lining in the smelter at Jerome, and to some extent the smelter at Humboldt. That is the only known value that I understand attaches to the property, but we all have hopes of concealed values in a mining property. The dismissal of the action is a matter of record. (88).

Redirect examination:

At the time I handed to Mr. Lasbury the paper, copy of which was read to me this morning, and he handed it back to me, (88) he said nothing in direct answer to the questions. He said: "We are not trying to deceive you, the deal is absolutely off." I replied that I did not care to discuss it any more. My best recollection is that I received the telegram Mr. Job sent me dated January 2nd early on the morning of January 3rd, it may have been the night before, I scarcely think so. (89). The reference in the compromise offer that I handed to Mr. Lasburg which was introduced on the cross-examination, Defendants' Exhibit "1," to a sale for $20,000.00, refers to the sale to the United Verde Copper Company of the West Brooklyn and White Rock claims under an option they had going to the United Verde. That was the
136 same option referred to in the subsequent contract which was signed. There was one other discussion with Mr. Lasbury I did not mention because I was not asked about it. (90). It was the day of this compromise offer. Mr. Lasbury handed to me to read a letter written to him by C. C. Miller and A. V. Miller. I will not state the contents of that letter of course. He insisted then that this would be an advantageous matter for the Brooklyn Company to permit this sale to be made to the United Verde, and we went over the same grounds that we had before. I saw that letter in Mr. Lasbury's office. I took a copy of it. Mr. Lasbury read it to me and I, with his permission, made a shorthand copy of the letter. I can't say from memory whose signatures were attached to the letter. I knew at the time who sent it. My recollection is that it was C. C. Miller. (91). I believe I have the notes of that copy, I know I have a transcript of it with me. I made it about an hour after I made the notes, and correctly transcribed it. I am a shorthand reporter and have been in the business of reporting in courts twenty-two years.

Q. Have you been advised by your counsel prior to January second whether or not it was essential to dismiss these suits before the first day of January? State whether or not you have been advised on that subject?

By Mr. Ross: We object.

137 By the COURT: Yes, the objection is sustained. (92).

The reference in one of the telegrams to a conspiracy with the United Verde brought out on cross-examination means that I was afraid that they would make a sham sale and defeat the object of the contract.

Q. Up to that time what advice had you received that there was no consummation of the sale to the United Verde, from any source?

By Mr. Ross: We object to that for the reason that he is not entitled to any advice at all up to that time, that the contract had not yet expired.

By the COURT: Yes, that would make no difference whether he was advised or not, prior to that time.

By Mr. HOWELL: I meant to include that time, if your Honor please. (93).

The letter exhibited to me by Mr. Lasbury, of which I took shorthand note copy, was in an envelope, postmarked Dewey, Arizona. The stamp was a United States postage stamp. It was cancelled. (94). The letter was signed by C. C. Miller and A. V. Miller. The notes I took in making the copy together with the transcript, or translated copy, are there in Mr. Job's papers. After I made these notes and translation I kept a copy myself and on my next trip to Arizona I brought a copy to Mr. Job. I attached the notes to the copy I brought to Mr. Job, over in his office,

138 gave them to him. They have ever since that time been in Mr. Job's office and in his files.

By Mr. HOWELL: I will ask to have these separately identified Shorthand notes, Plaintiff's Exhibit "M." 1.

Transcript do. Plaintiff's Exhibit "N."

Exhibit "M." 1. are the original notes I took in making a copy of this letter, and Exhibit "N" is the translation of that in long hand. I made them myself.

We offer in evidence the shorthand notes as Exhibit "M." 1. Then we offer in connection therewith, as a matter of convenience to the Court, the translation or transcription.

By the COURT: Very well.

I am familiar in a general way with the records of the District Court of Douglas County, Nebraska. I could examine the records.

Q. Did you make an examination of the records of the District Court of Douglas County, Nebraska, to ascertain whether or not a supersedeas bond had been filed by the Millers in the case in which the judgment roll has been introduced in evidence here?

By Mr. Ross: We object. That is not the best evidence to prove the record. (96).

By the Court: I will sustain the objection. I don't think it makes any difference whether the judgment is stayed or not.

By Mr. Howell: We offer to show by the witness, as a
139 mere matter of record, that he made a search of the office of the District Court of Douglas County, Nebraska, where the Judgment Roll came from, exhibited in evidence in this case, that he searched the books, indices, and appearance docket, and that no supersedeas bond has been filed in the case referred to, and also searched the files of that case and there was none filed. We now present a statute of Nebraska which purports on its face to be published under the power of the legislature, and we offer in evidence Section 677 of the Code of Civil Procedure found in the Revised Compiled Statutes of Nebraska, annotated for the year 1907, at page 1841 thereof, being the section pertaining to Undertaking and Supersedeas Appeal, Equity Cases. I suppose the ruling necessarily follows the others? (100.)

By the Court: Yes.

Testimony of M. L. Buckley.

I reside at Prescott. Have resided in this Territory about six years. I know C. C. Miller and C. W. Pearsall; was acquainted with them during the months of September and October, 1907. I was present at a conversation between Mr. Pearsall and C. C. Miller at the latter part of September or the first part of October of that
140 year when they were talking over a contract with the United Verde Copper Company. I don't remember enough to swear to anything they said; I didn't pay attention enough to swear to anything; they were talking something about the United Verde having an option on the silica property there at Dewey. I wasn't interested and did not pay attention to anything else in the conversation. That is the only thing I can recall as to that conversation (101).

Whereupon the plaintiff offered and there was admitted in evidence defendants' motion to require the plaintiff to dismiss which is a file of record in this court in case 5441, having been filed January 2, 1908, at five o'clock P. M.; and also offered and there was admitted in evidence the dismissal filed in the same case on February 13, 1908, at nine o'clock A. M.; and it was agreed that the formal entry of dismissal was made on the 15th of February, 1908, and that at the time the dismissal was filed the court was in actual session (101-102).

By Mr. Howell: Mr. Clerk, have you the Dismissals in 4923?

By the Clerk: That was a Minute Entry of the 18th of February, 1908.

By Mr. Howell: Showing that we stipulated to that?

By Mr. Norris: Yes, sir.

By Mr. Howell: The case 4923, being the case of the
141 Brooklyn Mining and Milling Company against C. C. Miller, was dismissed on February 18th, 1908.

Whereupon the plaintiff offered and there was admitted in evidence the dismissal of the case in this court of Charles C. Miller against the Brooklyn Mining and Milling Company on January 2, 1908. Thereupon plaintiff moved to dismiss out of its complaint, without prejudice, the action for an accounting, and it was ordered accordingly (103-104). (See minute entries March 26, 1909).

Charles W. Bennett, Deputy County Recorder.

Counsel for defendants stated that they wished to cross-examine Mr. Bradbury, the County Recorder, but as Mr. Bennett, the Deputy Recorder, had appeared they would consider it a cross-examination of Mr. Bradbury. Whereupon certain records were introduced, proved by the witness, and admitted in evidence, and an abstract read into the record, to-wit: Book 84 of Deeds, at page 516. Mining Deed, dated December 14th, 1906, between George B. Lasbury of Omaha, Nebraska, the first party, and C. C. Miller of Dewey, Arizona, and A. V. Miller of Omaha, Nebraska, second parties. Conveying to second parties all the right, title and interest of the first
142 party in and (104) to the West Brooklyn mining claim. Notice of Location of which is recorded in Book 67 of Mines at page 408, Records of Yavapai County. "This deed is made for the purpose of correcting and confirming that certain deed from the party of the first part herein to the parties of the second part, dated the 4th day of September, 1906, and of confirming in said second parties as of said 4th day of September, 1906, all my right, title and interest as described above herein." Acknowledged December 14th, 1906, before J. C. McClurea, Notary Public, of Douglas County, State of Nebraska. The acknowledgment bearing the Notary's seal and the expiration of his commission.

By Mr. HOWELL: The consideration of the deed being One Dollar and other valuable considerations.

By Mr. HOWELL: When was that deed filed for record?
By Mr. ROSS: We object to that as immaterial.
By the COURT: Answer the question.

A. It was filed for record at the request of Norris & Ross, August 29th, 1908, at 3:05 o'clock P. M.

Testimony of Charles C. Miller, One of the Defendants Called by Plaintiff for Cross-examination under the Statute (105).

I obtained a deed from the Bank of Arizona in Prescott,
143 along about April 30, 1908, from G. B. Lasbury to myself and A. V. Miller, covering the West Brooklyn mining claim, and I receipted for it.

Q. I hand you this deed which is marked Defendants' Exhibit "C," and I will ask you to state if that is the deed?

A. Yes, sir.

By Mr. HOWELL: Defendants' Exhibit "C" referred to is attached to the deposition of C. C. Miller, taken in the District Court of Doug-

las County, Nebraska, taken in the case (106) of Brooklyn Mining & Milling Company against Charles C. Miller and others.

I did not receive any stock at that time from the Bank of Arizona, in the Brooklyn Mining & Milling Company, from George B. Lasbury. I did receive some stock from them such as you have described during the month of November, 1907. I heard Mr. Hazeltine's testimony concerning the letters and draft. That fixes the time: the date of that draft was about the time I received that stock. I have an option contract between myself and A. V. Miller and Lasbury with the United Verde Copper Company, in writing or typewriting, or partly written and partly typewritten. I think it is in the hands of our attorneys.

Q. Under your control is it, subject to your order?

A. I think so. I will produce it.

Q. Have you got under your control a deed running to the
144 United Verde Copper Company covering the West Brooklyn and White Rock mining claims? (107.)

By Mr. Ross: That is calling for a conclusion of the witness on the issue of whether there is an option to the United Verde—whether that is under his control or not is a conclusion of law.

By the COURT: Strike out the words "under your control."

Q. Have you a deed of that kind?

A. No, sir. I saw such a deed only once, on the tenth day, I think, of December, 1906. I turned it over to my attorneys, Norris & Ross. They were my attorneys at the time I turned the deed over to them.

Q. You, at that time, gave them this deed as your attorneys, did you not?

A. No, sir; because they were the agents of the United Verde Copper Company——

By Mr. HOWELL: If the Court please, I object to his argument.

By the COURT: You are asking him——

By Mr. NORRIS: He said, "no, sir," and he has a right to explain.

By the COURT: It can be brought out on examination.

By Mr. HOWELL: Where is that deed?

A. I have no idea myself; I don't know.

Q. Your attorneys have it, or the last time you knew of it, Norris & Ross had it?

A. I don't know anything about it. (108.)

Q. The last time you knew of it Norris & Ross had it?
145 A. They never told me they had it.

Q. You delivered it to them?

A. Yes, sir.

Q. The last time you knew of it *is* was in their possession, was it?

A. Yes, sir. A. V. Miller died December 18, 1907.

Q. Do you know where the deed is that was tendered to the Brooklyn Mining & Milling Company on the second day of January, 1908?

By Mr. Ross: I have that deed right here in my pocket, Mr. Howell. (Hands paper to counsel for plaintiff.)

By Mr. HOWELL: May we use this at any time?

By Mr. Ross: Yes, sir.

By WITNESS: I have recently entered into a contract with the United Verde Copper Company for the furnishing of silica from the West Brooklyn and White Rock mining claims. It was some time during the last of September for a term of two years. (109.) Prior to that time I had a contract with the United Verde Copper Company for delivering silica from the West Brooklyn and White Rock mining claims.

Q. When did you make that contract?

A. I ain't very good as to dates—we made a good many contracts.

Q. The one prior to this one?

A. I really can't remember.

Q. Give us the best you can do by way of recollection, about when was it?

A. I don't think there was any contract in force.

Q. You were furnishing them with silica, were you, part of that time?

146 A. Yes, sir.

Q. As a matter of fact, you were furnishing them with silica continuously from about the first of December, 1907, until the present time, through one form or another?

A. Yes, sir. I have been receiving pay during all that time for silica from the United Verde Copper Company. Miller Brothers are the parties receiving the pay for the silica. (110.)

Q. Not since your brother died?

A. Yes.

Q. And Ada M. Miller?

A. The vouchers were made out to Miller Brothers.

Q. Who got the money?

By Mr. NORRIS: We object to that as immaterial and irrrelevant.

By the COURT: The objection is sustained to that.

By Mr. HOWELL: Did you pay any of that money to Ada M. Miller?

By Mr. NORRIS: We object.

By the COURT: The objection is sustained.

—. I furnished Norris & Ross some money on January 2, 1908, to tender to plaintiff in this suit. I think I furnished $1150.00, it may be $1100.00. It was some of my own money.

Q. Money that you earned in the ordinary course of business?

By Mr. NORRIS: We object,—it don't make any difference as to that.

—. I have never had a deed direct from A. V. Miler to myself covering any portion of these mining claims that are in this suit.

147 Q. Do you know of a deed from A. V. Miller to his wife, Ada M. Miller, covering any of these claims, any part of them or any interest in them? (111.)

A. Yes, sir. I do not know where that deed is. Mr. Ross had it when I saw it. I gave it to him. I got it from Mrs. Ada M. Miller, and she got it from A. V. Miller. They were at Dewey, Arizona, when he gave it to her. (112.) That deed was delivered by my brother to his wife in my presence in his life time. That was after the contract of August 27, 1907, was entered into. I know what you mean by the contract of August 27, 1907. I know when A. V. Miller signed the deed which contained a description of the West Brooklyn and White Rock claims running to the United Verde Copper Company. I think on September 10, 1906. When he signed the deed he gave it to me, and I gave it to Norris & Ross.

Q. Did this deed you speak of from A. V. Miller to Ada M. Miller cover the West Brooklyn claim, among others?

A. I don't think it covered anything except the West Brooklyn as near as I can remember (113). It was signed by A. V. Miller on December 18, 1907, and was delivered to her on that day. She took it in her hand and took it away or took care of it.

Q. Did you ever yourself, or did any one with your knowledge ever tender the United Verde Copper Company a deed from Ada M. Miller to the West Brooklyn mining claim?

148 By Mr. LING: That is objected to as wholly immaterial under any phase of the contract.

By the COURT: I don't see how that makes any difference.

By Mr. HOWELL: We offer to show by the witness that such deed was never tendered.

By the WITNESS:

A. The deed from A. V. Miller to Ada M. Miller was made while A. V. Miller was sick and was on his deathbed. He died the same day that it was made and given to her.

Direct examination:

I got a deed from the Bank of Arizona in April, 1908. (114.)

Q. What deed was that?

A. G. B. Lasbury. It is a deed to his interest in several properties. I don't know exactly when that deed was placed in the bank. It was something like two years previous to that.

Q. What were the conditions of the contract by which the deed was placed in the bank?

By Mr. HOWELL: That is objected to as not the best evidence.

By the COURT: Is the contract available? Was it a written contract?

By the WITNESS: Yes, the contract with Lasbury was a written contract. I do not have it, Lasbury has it in Nebraska. It is beyond the jurisdiction of this court. I don't think I have a copy of it; don't think I could ever find it. I wouldn't know where to look
149 for it, don't think I have got any. (115.) This contract was made for the property under which the deed was placed

in the Bank of Arizona at the same time the deal was made with the United Verde Copper Company. I had a further arrangement with Lasbury regarding that deed or the payment of the purchase price after the execution of the written contract by which it was to be put in the bank. It was about August 27, 1907, about the date of the contract of settlement with the Brooklyn Mining Company. I haven't that contract; it was in writing. Lasbury has it in Omaha. I have no copy of it. (116.)

Q. What did the contract say in substance?

By Mr. HOWELL: Wait a moment,—may I examine this witness?

By the COURT: Yes.

By Mr. HOWELL: You and Lasbury are on good terms, aren't you?

A. Yes, sir.

Q. You have known all the while that he had this contract?

A. Sir?

Q. You have known all the while he had this contract?

A. He had the contract?

Q. That Lasbury had it?

By Mr. ROSS: That is objected to, it being immaterial.

By Mr. HOWELL: You have known all the time that Lasbury had the contract that you have referred to, haven't you?

A. Yes, sir.

Q. You did have a copy of it?

A. I never kept a copy of it.

Q. Did you ever have one?

150 A. No, sir; I didn't think it was important enough to keep a copy of it.

By Mr. HOWELL: I think we will make the formal objection that no sufficient foundation is laid—it is calling for the contents of a contract in the possession of a co-defendant, and one who stands in sympathy with this man.

By the COURT: That would be good if it were not called out on cross-examination—if it could reasonably have been anticipated that this contract would be needed in this case it would be very good.

By Mr. HOWELL: It isn't in this case. We now ask that we may take the deposition of Mr. Lasbury and produce (117) that contract. Can we sue out a commission for oral interrogatories?

By the COURT: Under our practice it is the same in equity as in law.

By Mr. HOWELL: Can you sue out a commission for an adverse witness?

By the COURT: Yes, you can have the deposition of an adverse witness taken. He may answer the question. I think, under the circumstances, the production of this paper might not have been anticipated.

By Mr. HOWELL: It might not be necessary for us to ask for these things.

By the WITNESS: The contract stated that we were to pay him a

certain sum of money for his interest in a certain number of
151 mining claims, and for some stock that he owned. We paid that. I don't know the date when we paid for the deed to the property; it was prior to the time I got the deed from the bank. I could not say how long. I didn't pay the money myself. It must have been paid or we could not have got the deed. (118.)

By Mr. HOWELL: We move to strike out the argument and reasoning, as not being a statement of fact——

A. I don't know positively it was paid, only from hearsay evidence, that is all I know.

By the COURT: Yes, while that is true it is hardly of sufficient evidence to strike it out, I should say. The Court will give effect to it for what it is worth. The Court won't adopt his inference.

By the WITNESS: It wasn't necessary to take the deed from the bank before January 1, 1908, under the contract we had with Mr. Lasbury. I didn't pay the money before that time because I wanted to hold onto the money as long as I could. I knew we had to pay it. Awhile ago I answered that I gave $1100.00 or something like that to Norris & Ross the day the tender was made on this second day of January, 1908. (119.) $3150.00 was tendered. The other money came from the United Verde Copper Company.

152 Recross-examination:

I was to pay Lasbury $6000.00 for this deed.

Q. You did not pay him until after the first of January, 1908, because you wanted to keep the money as long as you could?

A. We did not pay him the full $6000.00 when we did pay him.

Q. I know—I am talking about the reasons now, not the amounts. You did not pay him until after January because you wanted to keep the money and use it as long as you could?

A. Yes, sir. I could not say how long I kept it after January, 1, 1908, because I did not pay him the money. I don't remember when the suit was commenced in Nebraska. I remember the fact.

Q. The money was not paid until after the suit was commenced, was it? That suit was commenced on the 28th day of January, 1908,—assuming that to be true? (120.)

A. Yes, sir.

Q. It wasn't paid until after that?

A. I couldn't say. I didn't pay the money. Mrs. Ada M. Miller paid it. It is my information that she paid it while she was in Omaha before she came to Arizona to live. She came to Arizona to live either in June or July, 1908.

Q. Your information was then that she paid $1500.00 through the South Omaha National Bank?

A. I don't know any of the particulars. My information from
153 her was that she paid Lasbury $1500.00. She did not bring with her from Omaha, Nebraska, from Lasbury an order directed to the bank to deliver this deed.

Q. It was your understanding that she paid the money about the time Lasbury directed the bank to turn over the deed, wasn't it?

By Mr. NORRIS: We object to the understanding of the witness.
By Mr. HOWELL: It would be improper if it were any person but the party.
By the COURT: The objection is sustained. (121.)

Testimony of Ada M. Miller, One of the Defendants, Called by Plaintiff for Cross-examination Under Statute.

My name is Ada M. Miller and I formerly resided in Omaha. I came to Arizona in July, 1908. Prior to that time I was a resident of Omaha, Nebraska. I paid George Lasbury a sum of money for a deed in the Bank of Arizona. I can't remember when I did it, it was just as soon after my husband's death as I could get it straightened up I paid it.

Q. It was in June or May, 1908?
A. I would not say when it was.
Q. Let me refresh your memory,—wasn't it in April, 1908?
A. I wouldn't like to say when it was.
Q. Isn't that your recollection?
A. It is not, because I really do not remember.
Q. It was after the suit was commenced in Nebraska, wasn't it?
A. I think it was before that. I think it was paid through the South Omaha National Bank. It was $1500.00. (122.) I
154 signed the answer that was filed in the court in Nebraska. I suppose I swore to that before Edith Olsen, a Notary Public in Omaha, a young lady there in Hall & Stout's office. They were my attorneys.

Q. That is the answer you filed in that court—you understand it to be?

By Mr. LING: That speaks for itself.
By Mr. ROSS: It is already in.
By Mr. HOWELL: It is agreed that the paper about which the witness is being examined is a paper offered in the judgment roll already in evidence.

Q. Mrs. Miller, did you get a deed from your husband the day or the day before his death to the West Brooklyn claim?
—. Well, I couldn't say for sure what it was.
Q. You got a paper, didn't you, touching the West Brooklyn claim?
A. I suppose it was.
Q. What did you do with it?
A. I don't know. I didn't do anything with it that day.
Q. I don't care when,—please tell if you did do anything with it?
A. It was left there and perhaps it was turned over to the attorneys
Q. Left where?
A. Left in Dewey. I left immediately after he died.
Q. Your husband died on the 18th of December, 1907?
A. Yes, sir.

Q. You took this paper from him and left it in the house (123) at Dewey and went to Omaha?

A. I didn't do anything with it at all.

Q. You never did anything more with the deed after that, yourself, I mean?

A. No, sir.

Q. Your husband gave the deed to you, did he, when he
155 signed it?

A. I didn't know what it was.

Q. Whatever it was,—let us assume it was something or other,—whatever it was, he gave it to you after he signed it?

A. In a way he did.

Direct examination:

I knew about this contract with the United Verde at the time. I knew about the deed to the United Verde. I knew all about the arrangements that we tried to make to carry them out.

Q. What was your understanding of what was being done with reference to carrying out the contract with the United Verde?

A. It was understood that the business was all straightened up, the deeds was placed to be turned over to the United Verde. I gave C. C. Miller a general power of attorney before I left for Omaha. (124). I knew about the contract of August 27th.

Thereupon plaintiff offered in evidence the following, all of which were admitted:

Plaintiff's Exhibit "O," the substance whereof was stated by Mr. Howell as follows: "This — option contract, if your Honor please, whereby A. V. Miller and C. C. Miller give an option to the United Verde Copper Company from the 4th day of September, 1906, for four months for twenty thousand dollars for the two mining claims, the White Rock and the West Brooklyn, and the deed, it
156 says, shall be placed in the hands of Mr. Norris as escrow agent for the parties, and upon the payment of the purchase money the deeds, of course, are to be delivered. There is also an agreement which I will let your Honor read."

Plaintiff's Exhibit "P," being the affidavit of C. C. Miller as to the assessment work for 1907, on the Empress, Midway and North Brooklyn mining claims, (125) and recorded December 20, 1907, page 59, Book 18, Promiscuous Records.

Plaintiff's Exhibit "Q," an affidavit.

Plaintiff's Exhibit "R," a deed. (126).

J. C. BRADBURY, County Recorder, recalled by plaintiff, testified as follows:

Q. Mr. Bradbury, have you made a search of the records in your office for a transfer of mining claims to ascertain whether or not there has been any transfer from Alonzo V. Miller and C. C. Miller, or A. V. Miller, Charles C. Miller and G. B. Lasbury, or George B. Lasbury, Ada M. Miller, or any other person to the United Verde Copper Company, a corporation, in Yavapai County, Territory of

Arizona, of the West Brooklyn mining claim located in the Big Bug mining district, Yavapai County, Arizona?

A. Yes, sir.

Q. Did you find any transfer to the United Verde Company of this description, or any other description to this West Brook-

157 lyn mining claim, of record in your office? (127).

A. No, sir; I did not. I looked through the indices. That is a book required to be kept by law. I made a search of the books required by law to be kept.

(Witness excused.)

By Mr. HOWELL: Have you the other deed prepared by Mr. Job, including the West Brooklyn?

By Mr. Ross: I don't recall ever having any such deed.

By Mr. HOWELL: Have you, Mr. Miller?

By Mr. MILLER: No, sir.

Testimony of Thomas C. Job, a Witness for Plaintiff.

Direct examination:

The written portion of Exhibit "R," a deed, except the signatures and acknowledgment is in my handwriting. I prepared that and delivered it to Norris & Ross. At that time I prepared two deeds, this being one, and took both to the office of Norris & Ross (128) and left them with Mr. Norris with the suggestion that in the event the United Verde did not take the West Brooklyn mining claim on the first day of January, 1908, that the deed including the West Brooklyn mining claim which I prepared and submitted at the same time would be used and executed, and I made the suggestion also that in case the United Verde did take the West

158 Brooklyn this deed should be executed and delivered to the company. The other claims (deed) included all the claims, including the West Brooklyn.

Deposition of Thomas H. Ensor.

(PLAINTIFF'S EXHIBIT "I.")

Direct examination:

My name is Thomas H. Ensor; I shall be 51 years old next March. I reside in South Omaha, Nebraska, and am a physician and surgeon. I have been connected with the Brooklyn Mining & Milling Company both as a director and stockholder for awhile. I think up to the fall of 1905, when I sold all my holdings in said company. I have known the defendant George B. Lasbury for the past twenty years and intimately for the past seventeen years. I have been to the properties of the Brooklyn Mining & Milling Company in Arizona, and am familiar with the mining claim known as the "West Brooklyn" claim. On or about the 27th day of January, 1908, at

the office of Wright & Lasbury in Omaha, Nebraska, I had a conversation with defendant George B. Lasbury concerning the West Brooklyn mining claim located in Big Bug mining district,
159 Yavapai County, Arizona. The conversation related to the deal which Mr. Lasbury and the Millers had pending with the United Verde Copper Company, concerning the West Brooklyn claim; and it also related to the deal the Lasburys and Millers had with the Brooklyn Mining and Milling Company, and it also related to Mrs. Ada M. Miller's interest in the properties. It further related to litigation that was going on between Mr. Lasbury and the Millers and the Brooklyn Mining and Milling Company. I asked Mr. (219) Lasbury about the deal with the United Verde Company and he said that as to closing that deal it had fallen through owing to the fact of the panic and Senator Clark said he would not take the West Brooklyn on that account. Lasbury said that they had up to a certain time to close the deal and could not make it owing to the fact that Senator Clark refused to go on on account of the hard times. I asked him how about his deal with Pearsall and he said that their attorneys had made a flash on Pearsall's attorneys with the money, which of course did not go. He said that the deal they had with Pearsall was off as he would not accept the money and he said the reason Pearsall would not accept the money was because Senator Clark did not take the property. Lasbury said it was too bad, that everything was all right and would have went through if it had not been for a shortage of money, and he
160 regretted it very much. He said that if the times got better he thought they might make the deal later on. I asked him if they had put up the amount of money called for in the contract, $8500, and he said no, that they had made a flash with some money and stock, and I asked him if the contract called for an equivalent, and he said no, it called for $8500.00, but the Company had put a price on the stock and had agreed to take the stock at so much, and said that their attorneys said that the tender was good, but that it was a pretty fine point and would have to be decided by the Courts. I asked him how things were and he said it hangs on this point as to whether we have lived up to our contract or not, and our lawyers say we have; that the price *as* agreed on as to the value of the stock at 3 cents and when they had put up the balance of the money he did not see why Pearsall did not close the deal. I asked Lasbury; I said, what are you going to do with the property now, George? and he said that Mrs. A. V. Miller said that she was either going to send her son George down there or had sent him down there to look after her interests and in that way they hoped that they would get something out of it. I remarked that there must be something in the proposition or Mrs. Miller could not afford to take her son away from Cudahy's as an operator and send him down there, and Lasbury remarked that no doubt there was good money in it,
161 but as long as it was left to Charley Miller, unless he was watched we will get nothing out of it. Mr. Lasbury said, I have never received a dollar out of the proposition, as you know, and never expect to unless the claim is sold and I can get rid of my

stock. I asked him who was the stumbling block in the deal between Pearsall and them, and he said they were willing to go ahead with the deal with Pearsall, but Pearsall was the stumbling block and the deal with him had not gone through. That they were willing to pay Pearsall the money, but he would not take it. Lasbury said that Senator Clark said that on account of the panic he would not take the property.

Deposition of Charles J. Collins.

(PLAINTIFF'S EXHIBIT "J.")

Direct examination:

My name is Charles J. Collins; I am 51 years old and reside in Lena, Nebraska. I am connected with the Omaha Water Company and am also engaged in farming to some extent. I am temporarily stopping at 627 North 24th street, South Omaha, Nebraska; I expect to be there until after the holidays. I know Ada M. Miller, widow of Alonzo V. Miller, and have known her for twenty years. I knew A. V. Miller during his life time, and knew about the time when
162 he died. I had a conversation with Mrs. Ada M. Miller, the widow of Alonzo V. Miller, one of the defendants in this case, at her home in Omaha, Nebraska, concerning the West Brooklyn mining claim located in Big Bug mining district, Yavapai County, Arizona, during the latter part of January or the fore part of February of this year. The conversation related to matters concerning the West Brooklyn mining claim located in Big Bug mining district, Yavapai County, Arizona, and to affairs of the Brooklyn Mining and Milling Company, and to some stock that I wanted to sell, also to a deal between A. V. Miller, C. C. Miller, George B. Lasbury and Mrs. Ada M. Miller and the United Verde Copper Company and Senator Clark, and also related to a law suit between the Millers and Lasbury and the Brooklyn Mining and Milling Company. (224). I had some stock in the Brooklyn mine and I asked Mrs. Miller if she wished to buy the stock, or knew of any one that would buy it. She said "No, that the Brooklyn mine was not doing anything on account of the law suit between Pearsall and themselves," and unless Pearsall took this money that they had offered him in payment for the West Brooklyn claim it would probably be tied up for a long time, as they intended to give Pearsall all the law he wanted on that point. She said that Pearsall was making a mistake because he couldn't run that mine without their
163 influence out there, and that they had influence and that Pearsall could never get the West Brooklyn. I said to her that I understood that they had sold the West Brooklyn to Senator Clark, and she said no, that Senator Clark refused to take it on account of the hard times, but possibly if times got better there, there might be a deal made. I asked her if there was anything being done on the West Brooklyn, and she said yes, that they were mining it and selling the silica to the United Verde; that Lon had left that

for she and the boys for a living. She said that her son George was down there and that Charles was in the Navy, but he would probably come back and go down there and assist in working the West Brooklyn claim. I asked her if it was not possible to make some compromise of this whole matter instead of lawing it, and she said no, they couldn't do anything with Pearsall; that they would just have to give him all the law he wanted. I wanted to learn if the stock that I held had any value, and if so, if I could sell it. I did not inquire of Mr. Pearsall at that time concerning the affairs of the corporation, the Brooklyn Mining and Milling Company, or concerning the West Brooklyn claim. (225). In the effort to find Mr. Pearsall I called at his office and found that he was not in, and then I called up his residence by phone and learned that he was in Arizona. I had the conversation with Mrs. Miller
164 on the same day after I tried to find Mr. Pearsall. I would say that the conversation was sometimes between the fifth and fifteenth of February, 1907. (226.)

(PLAINTIFF'S EXHIBIT "K.")

Deposition of Edward W. North.

Direct examination:

My name is Edward W. North, am 46 years old and reside in Omaha, Nebraska. I am Chief Deputy Collector Internal Revenue, District of Nebraska, and have been such Deputy Collector since July 1, 1903. I am Secretary of Brooklyn Mining and Milling Company, and I held that position on the 30th day of December, 1907. I had then been informed of the contract of date August 27, 1907, between the Brooklyn Mining and Milling Company of the one part, and Charles C. Miller, Alonzo V. Miller and George B. Lasbury, of the other part, in relation to the settlement of certain litigation then pending in the District Court of Yavapai County, Arizona, concerning and affecting the West Brooklyn and other mining claims, which contract as I understand it, is the subject of litigation in this case. On December 30, 1907, I heard a conversation between Mr. Charles W. Pearsall, the then President of the Brooklyn Mining and Milling Company, and Mrs. Ada M. Miller
165 and George B. Lasbury relating to the contract of August 27, 1907. The conversation was in the south Court Room on the third floor of the post office building in Omaha, Nebraska. There were present Charles W. Pearsall, Mrs. Ada M. Miller, George B. Lasbury and myself. I heard all of the conversation. It related to the contract between A. V. Miller, C. C. Miller and George B. Lasbury and the Brooklyn Mining and Milling Company, and also to the mining claim known as the West Brooklyn mining claim, and transactions that Mrs. Miller, George B. Lasbury, A. V. Miller and C. C. Miller claimed to have had with the United Verde Copper Company, or with Senator Clark, on behalf of the United Verde Copper Company. I participated a little in that conversation. Mrs.

Miller addressed her remarks to Mr. Pearsall, and said: "We have come to see if we cannot make some different arrangements about the terms of this contract," or words to that effect. She said that the agreement with the United Verde Company was off; that there was no possible show of it being carried through, as Mr. Clark said that owing to the financial stringency the Company could not raise the money, and Mrs. Miller said that Mr. Pearsall should not insist upon the payment of the amount stipulated in the contract; that they, the Millers and Lasbury, could not get the money anywhere else—it was impossible for them to borrow it at the bank. Lasbury confirmed this statement, saying: "Yes, you know, that owing to the present condition of financial affairs, that would be impossible." Mrs. Miller further said: "If you do not agree to a different arrangement we will be in duty bound to deed this property over to you, according to the terms of the contract." Mrs. Miller further said that she thought Pearsall should be satisfied if the stock held by the Millers and Lasbury was turned over to him, or to the company, and that he should waive any cash payment. I then said, "that in view of the fact that her husband A. V. Miller had stated that the stock was worthless, unless the holdings of the company embraced the West Brooklyn mining claim, her proposition seemed (231) to have no merit whatever." Mr. Pearsall said that he had no notice that the sale of this claim to the United Verde was off, and Mrs. Miller said in response to that, "Well, you have my word for it, and my word ought to be good, and I will go before a Judge or Notary Public and make oath that the sale is off." This in substance covers the conversation. After this conversation Mr. Lasbury and Mrs. Miller left the Court Room. I remained two or three minutes and then I left the Court Room. (232.)

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167 *Evidence for Defense.*

Counsel for defendants offered and there was admitted in evidence, Defendants' Exhibit "2"; and also offered and there was admitted in evidence for all purposes the deposition of C. C. Miller, also the stipulation attached thereto, except as follows:—

By Mr. HOWELL: Except now, Mr. Norris, there is a blanket stipulation that the certified copies in the Nebraska Court, don't put them in.

By the COURT: So far as the stipulation throws light on the case referred to in the agreement, I presume.

By Mr. HOWELL: Yes, but we have a blanket stipulation in there that would allow anything almost to go in in the way of records. (129-130.)

By Mr. ROSS: I want to add that this marked Defendants' Exhibit "3" and commencing on page 5 of the deposition referred to and ends at the top of page 11.

By Mr. HOWELL: I would stipulate under that stipulation counsel put in what would cost $100.00?

By Mr. NORRIS: We offer Mr. C. C. Miller's deposition. It is already admitted.

By Mr. Ross: The same is attached to the deposition of W. L. Clark, already offered in evidence.

168 By Mr. Norris: Now we offer the record in this court showing:

1. Action 4541 was instituted by Charles W. Pearsall against Charles C. Miller, Alonzo V. Miller, George B. Lasbury, the United Verde Copper Company and the Brooklyn Mining & Milling Company, dated and filed the 31st day of December, 1906, in the District Court of Yavapai County, Arizona, asking that defendants be declared to hold title to the West Brooklyn and other claims for the Brooklyn Mining & Milling Company.

2. Action 4608 was commenced on May 7th, 1907, by C. C. Miller, plaintiff, against the Brooklyn Mining & Milling Company, defendant, asking judgment for something over $5000, for work and labor, and the answers that were filed in these two cases.

3. On the 27th of July, 1907, a supplemental complaint was filed in case 4541 making the Brooklyn Mining & Milling Company party plaintiff; setting up practically the same facts as were stated in the original complaint when the action was commenced.

4. On August 27th, 1907, an agreement was entered into (131) between the Millers and Lasbury and the——

By the Court: That is all in evidence.

By Mr. Norris: As has heretofore been introduced in evidence.

5. On January 2nd, 1908, case 4608, by C. C. Miller
169 against the Brooklyn Mining & Milling Company was dismissed in open court and the order of dismissal then entered.

6. A motion was filed on that day, as shown in evidence, asking for the dismissal of action 4541, above mentioned, by the defendants. That a tender was made of the money and of the stock and deed and affidavits of assessment work described in the motion.

By Mr. Howell: No, that has been heretofore referred in the evidence specifically. Let us not stipulate twice, Judge, the amount was $3150.00, and 175,000 shares of stock and the deed marked Exhibit "R," and two affidavits, and they are in evidence. Let us not stipulate on that.

7. On January 11th, plaintiff filed a second supplemental complaint in case 4541 setting up the reasons for refusing the tender referred to as having been made on January 2nd.

8. On February 11th, 1908, plaintiff files in case 4541 a third supplemental complaint setting up the same exhibit, to-wit: the contract of August 27th, 1907, and asked for an injunction restraining the defendants in that action, and asking for the enforcement of the contract of August 27th, 1907. (132.)

9. On February 11th, 1908, plaintiff served a notice in case 4541 that they would, on the 12th, apply for an injunction against Miller Brothers and the United Verde Copper Company and the
170 Arizona Smelting Company, who were made parties defendant.

10. On February 11th a motion was filed suggesting the death of Alonzo V. Miller and asking for an order continuing action 4541 against his representatives.

11. On February 11th the order granting continuance of the action against Ada M. Miller, Charles C. Miller No. 2 and George Miller in case 4541 was made.

12. On February 12th the action was set for hearing on the application for an injunction

13. On the 13th day of February, 1908, at nine o'clock, plaintiff in case 4541, filed the dismissal heretofore introduced in evidence by plaintiff, with the Clerk, without an order of the Court, the same being a day of the regular court session.

14. On the same day, February 13th, at nine o'clock and ten minutes plaintiff filed suit No. 4923 setting up the same contract and practically the same facts as in the third supplemental complaint, asking for the appointment of a special guardian for George Miller and an injunction against the defendants restraining them from quarrying silica, and seeking specific performance of the contract of August 27th, 1907. (133.)

15. On February 13th, at three o'clock P. M., in case
171 No. 4923 plaintiff applied to the court for an order for a Writ of Injunction.

16. At 3:30 o'clock on February 13th, 1908, in case No. 4923 plaintiffs obtained an order directing a hearing on the application for injunction fixing February 17th, 1908, for such hearing.

17. The record does not show what disposition was made of the hearing on the 17th, but it is stipulated that the application for the injunction was denied, in case No. 4923. On the 18th of February, 1908, case No. 4923 was dismissed without prejudice at the hour of ten o'clock A. M. And thereupon at ten o'clock and ten minutes case No. 4927 was filed setting up the same facts identically as were contained in No. 4923.

By Mr. JOB: It is stipulated that in whatever particulars the foregoing is at variance with the record or what is shown by the record, in those particulars the stipulation may be made to conform to the record.

By the COURT: An application to the Court may be made to correct the stipulation.

18. On the 15th day of February, 1908, case No. 4541 was dismissed in open court. Case No. 4923 was dismissed in open court at ten o'clock A. M. and case No. 4927 was commenced at ten o'clock and ten minutes setting up the same allegations.

By the COURT: That is the suit we are trying?

172 By Mr. NORRIS: Yes.

By the COURT: That need not go into the stipulation.

By Mr. NORRIS: And that the complaint in No. 4923 contained the same stipulations (allegations) as in the present case. (134.)

By Judge HAWKINS: I don't know whether they do exactly or not.

By Mr. JOB: We would like the privilege of making corrections to these in the morning.

By the COURT: Very well.

Testimony of J. M. Ross.

I was going to state that during the month of December, 1907, at a session of the court here, in open court, I requested the dismissal of action No. 4541, and as I requested it Mr. Job said: Under his understanding that case was not to be dismissed at that time. At that time I attempted to dismiss the Miller case, Charles C. Miller against the Brooklyn Mining & Milling Company. It was a very busy session and it was not entered, and subsequently it was entered, on January second.

By Mr. HOWELL: The plaintiff offers in evidence the deed that was sent by Miller to the United Verde Copper Company on or about the second day of January, 1908, and counsel for the defendants state that they have not it in open court but will procure it. (135.)

173 By Mr. NORRIS: We will produce a copy of it.

By Mr. HOWELL: We would also like to ask for the deed from A. V. Miller to Ada M. Miller referred to in the testimony of C. C. Miller and Ada M. Miller saying it is in the hands of the attorneys. It is stated by counsel for defendants that they have not the deed in open court but will produce it in evidence.

By Mr. JOB: We have not looked over the entire matter of the stipulation of yesterday, but insofar as the stipulation states the matters which affirmatively appear upon the record it is agreed to and the right is reserved to both parties to make any changes that the record may justify, or to file a copy of any paper of record referred to in the stipulation.

By Mr. NORRIS: While the record is as much susceptible of verification now as at any time in the future;—we have diligently prepared this,—if we have failed we do not know it,—if we have we should pick it up,——

By Mr. JOB: The reference in the stipulation to the matter of the tender,—we cannot stipulate as stated therein,—concerning the tender which was made in open court. We stipulate that the following papers and documents were offered: $3150.00 in money,—175,000 shares of stock of the Brooklyn Mining & Milling Company,—the deed which is marked Exhibit "R," being the

174 deed tendered the Brooklyn Company,—and two affidavits of Assessment Work which were in evidence. (136.) We do not stipulate that this tender was made in accordance with the terms of the contract.

By Mr. NORRIS: All of the balance of the stipulation suggested before closing the session yesterday afternoon is agreed to?

By Mr. HOWELL: With the modification as stated by Mr. Job, reserving the right to file any corrections.

Testimony of Thomas C. Job.

(Cross-examination).

I remember that Judge Hawkins and I came to the Court House with that paper, with the paper introduced in evidence heretofore for the dismissal of action 4541. I think we were together. The best of my recollection is that we went to the Clerk's office together and we filed it, but whether he filed it or I filed it I cannot say, but we filed it in conjunction. I can't remember the date of the filings. I cannot remember whether I had any other papers with me at the time. I am unable to say whether I carried with me at that time the complaint in action 4923. I have no direct recollection upon that subject. The complaint in No. 4923 was filed there shortly after this dismissal was filed. Whatever the record shows is correct. (137.) I can't remember whether it was filed on the same trip. The complaint may have been brought by my
175 stenographer or myself, I can't remember, the record shows when it was filed. (138.) I represented the Brooklyn Mining and Milling Company as attorney. I was acting under instructions from the Company through all these proceedings.

By Mr. NORRIS: We offer that portion of the record——
By the COURT: You offer the Minute Entry of February 17th in case No. 4923?
By Mr. ROSS: And the Minute Record of the 15th of February, 1908, dismissing case No. 4541——
By Mr. NORRIS: That is offered and stipulated in the evidence.

Testimony of Charles W. Pearsall (Recalled for Cross-examination).

Q. Mr. Pearsall, you were the original plaintiff in action 4541?
A. The number I could not be certain of, Mr. Norris; I was the original plaintiff in the first action.
Q. Was that the suit upon the contract?
A. Well, to say technically whether it was on the contract or not, I cannot recall, but the contract formed some portion of the basis (139) of the action. I think I have the original contract. (140.) I was in charge of the Company's affairs during the year 1906 from about the middle of January up to the present time. (143.)

176 ERRATUM.—This page is a duplicate of page 168 and of folios 502, 503 and 504.

177 By Mr. NORRIS: May I ask, Mr. Witness, whether a stockholders' meeting was held about that time?
By Mr. HOWELL: We object to that as immaterial.
By the COURT: He may answer that question.

A. Yes, there was a meeting.
Q. Who held a majority of stock at that time?

By Judge HAWKINS: We object to that,—the records of the company are the best evidence of that.

By Mr. LING: It is a fact, if he knows it.

By the COURT: If he knows he may state it. Do you know?

A. I am not sure about the majority holdings,—I know some of the stockholders.

By Mr. NORRIS: What were your stock holdings at that time?

A. I think 15,000 shares,—it might,—I had bought and paid for 7,500 and held a contract of purchase on 7,500 more, you might say I had 15,000 shares. I have had charge of the Company's affairs and the litigation laid between myself and counsel. Counsel and I have not always worked in accord with what has been done. (144.) I knew of the litigation down here and directed the refusal of the tender which has heretofore been described. I knew that the litigation had not been dismissed, as nearly as I could know at that distance. I instructed that suit to be dismissed and a suit for specific performance brought either the latter week in December
178 or the first week in January, 1908, those were my instructions. I communicated my instructions by letter. I have not that letter. I think Mr. Job has it. I wrote to him and suppose he can produce it, I don't know how complete Mr. Job's files are. I will produce it if the Court wants it. I know what was done in that suit thereafter as near as a telegram could advise me and a letter of two weeks later. I haven't the telegram which advised me, I only brought the telegrams which were introduced in evidence, which Mr. Ross read to me. (145.) I can't describe the telegram you are asking about. I am not certain whether the intelligence came to me by letter or telegram, perhaps by both, or one or the other. I don't believe I have them here. Mr. Job wrote it to me. My impression is that it was a telegram followed by a letter.

Q. Both telegrams and letter?

A. That is my best impression. I would say that the letter was at least two weeks later, it may have been more. I may not have received the telegram on the evening, it was between the telegram of January second and that letter I received later. It would be early in January because my recollection is that that letter contained a description of the (146) affairs here and came about or shortly after the middle of January. Now, I am unable to say whether I received a telegram after that telegram of January second
179 and before the receipt of that letter,—I am not able to say that, Mr. Norris, positively. Well I don't know whether I learned that the action was still pending after January first, or took it for granted that it was. I took it for granted because I had heard nothing to the contrary. I had given instructions like this: I wanted the Company to meet a full compliance in our part of the contract, and a demand made for a performance of the contract on their part, that is the instructions I gave. It is my impression that that instruction was contained in a letter of December 26th, I think that is the date, 1907. I have not that letter, Mr. Job would have

it. I know he received it because thereafter I heard from him with reference to it. I don't know as I have discussed that specific letter with him, no, sir. (147.) He wrote me a letter after it, I supposed it was in answer to the letter. I am sure I cannot recollect just what was said in the letters altogether, but I suppose he described to me what was being done in the litigation here. I think along during January some time I learned by correspondence that the proceedings were still pending down here Mr. Job told me about it before I came myself. I think I came the first week in February, it seems to me that it was during the first week in February. I believe I recall I was here on Washington's birth-
180 day, the 22nd. I believe I was here February 11th. I was in the city when action No. 4541 was dismissed and the complaint in No. 4923 was filed. (148.) I was not present at the dismissal attempted to be made in the Clerk's office. I understood that was the object of the errand here at the Court House on the part of my attorneys. No, I don't understand that we were contending it was unnecessary to dismiss. It was never my contention that I was trying to get relief on the original action. I told you awhile ago counsel and I differed sometimes. I didn't think I was a better lawyer than my counsel. I had my opinions and they had theirs, and I yielded. I was not in the Clerk's office at the dismissal of this suit. I said I understood that to be the object of the errand to the office. I believe I was in Mr. Job's office.

Q. Previous to their starting to this office to dismiss that had you not subscribed to and verified the complaint to be filed by them immediately on the dismissal?

A. No, sir; I don't believe I had done it previously.

Q. You had not?

A. I don't think so, I think it was done very shortly afterwards.

By Mr. HOWELL: It is immaterial, he did it some time. (149.)

A. (continued). Yes, but I don't want to fasten myself down to a few minutes time.

Q. Isn't it a fact that all those papers came to the Court House at the same time, with the complaint perfected at the same time?

181 A. If either Mr. Job or Judge Hawkins says so I will admit it, I don't know.

Q. You don't know that you had prepared the complaint before that?

A. Yes, I think it was prepared before that.

Q. You knew it should be filed?

A. I intended it should be filed. I think it was verified right after the dismissal, I am not sure of that. I don't know before whom I verified that complaint. I can't recall that.

Q. Mr. Job?

A. I don't recollect that.

Q. You were cognizant of the argument that took place upon that act on the 15th following, were you not?

A. Not to be bound by the date, I was here when there was some

argument indulged in. (150.) There was an argument or a debate or whatever you might denominate it, I think, succeeding the 13th. I was here on the day succeeding the 13th when this matter came up in the court. I was here several times when these matters came up. I was not out of the Territory during that time, but I (151) cannot remember the exact dates. It is my impression that I was here when the suit for specific performance, dismissed in advance of filing this suit, was dismissed. I don't want to say positively that I was or was not, I think I was.

Q. Didn't you on the evening of the 17th and the morning of the 18th assist counsel in preparing the present complaint?

A. The date I cannot say. I cannot say when that was
182 done. (152.) I would be perfectly willing to say if I could safely.

Q. Immediately on dismissing cause No. 4923, you had prepared and sworn to a complaint in the action to be filed then, which is the present action?

A. I can't remember those details as closely as that, and I would not even say just when I filed this action. I am unable to remember to be so close about it. I thought before I left Omaha that the original action No. 4541 had not been dismissed or disposed of. Previous to my leaving Omaha on or about January 28th, I commenced an action there which was based upon the contract sought to be enforced in this case. These proceedings were still pending. I verified the complaint before starting down here.

Q. In this language: "State of Nebraska, County of Douglas, ss. Charles W. Pearsall, being first duly sworn, deposes and says: That the Brooklyn Mining & Milling Company is a (153) corporation organized and existing under and by virtue of the laws of the Territory of Arizona, and for that reason the plaintiff herein does not verify this complaint. Affiant further says that he is president of said corporation and agent thereof and authorized to verify this complaint; that the facts set forth in the foregoing petition are true, as he verily believes." In which complaint, being so verified, is contained this expression: "The plaintiff stands ready and willing,
and has at all times on and since the first day of January,
183 1908, stood ready and willing to pay the fair and reasonable value of the assessment work on said last named claims (meaning the mining claims mentioned in the complaint) as provided in said contract, and has stood ready and willing and now is ready and willing to perform each and all of the covenants and agreements and obligations in said contract wheresoever found to be by it performed as per the terms and conditions in said contract, and now offers to perform each and all of the covenants, agreements, conditions and obligations by it to be performed under the terms in said contract?"

A. Did I sign that?

Q. Yes.

A. Provided you have it correctly, I signed it that way, yes.

Q. You say your view was that the suit should be dismissed?

A. I don't say that, I mean we should tender a performance of the contract on our part.

Q. What do you mean by saying: "We should tender a performance of the contract on our part?"

A. We should assert our willingness to dismiss the case as per the terms of the contract. (154). At the time of making this affidavit as the representative of the Brooklyn Mining & Milling Company with authority, I stood ready to perform all the obligations therein contained as required by that contract. No change has taken place in my willingness to perform.

Q. You were willing at all times to accept the things called for to be turned over to the Brooklyn Mining & Milling Company if a sale were made to the United Verde, a bona fide sale to the

184 United Verde?

A. Bona fide to the United Verde on or before the first of January, 1908.

Q. Was there any difference between the first of January, 1908, in the surrounding conditions, and the 28th of January, 1908?

By Mr. HOWELL: That is objected to, if your Honor please, as calling for a conclusion of the witness; it is indefinite and uncertain, and the contract will control thereafter.

By the COURT: I understood he meant to stand upon the contract and not upon any other thing. (155).

By Mr. NORRIS: Why, that should be consummated on the first rather than on the second or third.

Q. Were you ready, as the representative of the Brooklyn Mining & Milling Company, or was the Brooklyn Mining & Milling Company ready on the 2nd of January to dismiss this suit, accept the demands and transfers provided by the contract on the condition of the sale to the United Verde?

A. If there had been a sale, bona fide sale, to the United Verde, the Brooklyn Mining & Milling Company was ready and willing to perform their obligation on our part.

Q. If by the dismissal the sale could have been consummated, were you ready and willing to dismiss?

A. If there had been one consummated we were ready to dismiss.

Q. If the sale had been made in spite of the litigation, is that what you mean?

A. I don't know as that is what I mean.

185 Q. Tell us exactly what you mean?

A. If I had been convinced that this was all there was standing in the way of that sale, and that a deal would have been closed up, excepting for that, if I was convinced of it reasonably, I was ready and willing to carry out the terms of the contract and dismiss the case, yes, sir.

By Mr. NORRIS: You say you would have been willing if you could have been reasonably convinced that the pendency of the suit was the only obstacle to prevent the sale, and that if the suit were dismissed the sale would have been made, you would have consented to dismiss the suit and allow the sale to be made?

A. Yes, sir; that is what I believe I said. Up to that time the assertions were all to the contrary. (156).

Q. Did you know of any other obstacle, so far as you were concerned, having been put in the way of the sale?

A. Yes, sir; I did.

Q. By you?

A. Not by me, no, sir.

Q. What other obstacle did you know of your own knowledge at that time to exist?

A. I mean knowledge gleaned from information given me by the defendants, is the way I knew it. Their assertions that Mr. Clark would not close up this deal.

Q. Answer the question. I asked if you knew of your own knowledge of any other obstacle standing in the way of the sale? I want that question answered, yes or no. You are an intelligent witness and able to answer.

186 By Mr. HOWELL: The witness has described what he knows and how he knows it, and that is of his own knowledge of the obstacles.

By the COURT: Counsel have a right to put questions the way they please. He may ask for the knowledge he has, personal knowledge.

By Mr. HOWELL: He has answered the question, and he said in qualification——

By Mr. NORRIS: But I want the answer and then counsel may call for the qualification.

By the WITNESS: Yes, I desire permission to qualify it.

By Mr. NORRIS: You may have the permission when counsel take you.

Q. Do you know of your own personal knowledge any other obstacle standing in the way of the completion of that sale in your interpretation of the completion of the sale? (157).

A. I don't admit that was an obstacle, that is what I am contending.

By the COURT: That is argument. Get the facts and let us get through.

By Mr. NORRIS:

Q. Do you know of your own personal knowledge of anything else?

A. No.

Q. Now you have never asked those people either directly previous to January first nor at any time subsequent for a demonstration to you that that sale could be made whereupon you were to dismiss this suit, have you?

A. I asked them——

Q. That answer is yes or no.

A. I don't believe I have ever asked them for anything of
187 that kind, within the time limited by the contract. I have not asked for a demonstration, if I understand the question correctly.

Q. Had you not been informed that the deal could be concluded, in your interpretation of the consummation of the deal, upon the dismissal of this suit?

A. I don't think I was ever informed of that, Mr. Norris.

Q. Were you not told by Mr. Miller in a conversation you mentioned with him in Arizona, sometime in February, 1908, that the sale had been completed and the deed delivered?

A. Mr. Miller told me,—may I repeat Mr. Miller's statement?

Q. You have, yes.

A. I don't like to say yes or no to an expression because I would have to say "no," because that is not the language, yet that is not the impression.

Q. Didn't Mr. Miller tell you that the United Verde Copper Company was the owner of the property?

A. Mr. Miller said this: I said, "Charley, what is the real reason the United Verde did not take this?" He says, "They have taken it." (158).

Q. Did you know of any other reason than this litigation to keep them from taking it,—do you even now,—if they have not taken it before?

A. Yes, I do,—so as to be fair all around, I know it from the testimony that has been given in the case. I can't say, therefore, that is my own knowledge.

Q. That is a conclusion of yours, in other words?

A. You are asking for a conclusion, you must necessarily
188 get it.

Q. I meant to ask you for a fact, not a conclusion. The reason, as I understand it, ascribed to you, which you obtained through the medium of conversations, that the United Verde did not take this property before January 1st, 1908, and pay for it, was the financial stringency?

A. That is the reason they gave me.

Q. Upon the same basis, do you know that is the reason?

A. Only what they told me.

Q. Is that your conclusion from what they told you, that it was an actual fact that the property did not go because of the financial stringency?

A. I have my doubts about that.

Q. You heard Mr. Clark testify that they were ready to take it at any time?

A. I remember the testimony of Mr. Clark in the deposition, I did not interpret it. (159).

CHARLES C. MILLER, recalled.

I have been a resident of Dewey, Arizona for eleven years. I was one of the original locators of all the mining claims which have been mentioned in this case. At the time I went out there my brother was a resident of Nebraska. After I went there and became interested in these mines my brother came down to this country. (162). I received the contract of August 27, 1907, prior to its execution, by United States mail from Omaha, Nebraska. At the time it was received it had been signed by Charles W. Pearsall, G.
189 B. Lasbury, and A. V. Miller. I had no communication, oral or written, with the Brooklyn Mining Company after the re-

ecipt of that contract before I signed it. (163). I read it over before I signed it. The only reason that ever induced me to sign this contract was to get Mr. Pearsall's case dismissed. I have read the letter offered in evidence yesterday, being Plaintiff's Exhibit "N."

Q. State whether or not is was a fact that at that time you could have sold the West Brooklyn mining claim if the pending litigation were dismissed?

By Mr. HOWELL: We object to that as calling for a conclusion of the witness, and involved in the question is the mental condition of the supposed purchaser.

By Mr. ROSS: The purchaser has testified.

By the COURT: He may state what the United Verde had done in the matter.

By Mr. HOWELL: That is all covered in the deposition.

By the COURT: That is sufficient, then.

By Mr. ROSS: It don't go back to the time when this letter was written.

By the COURT: It is immaterial what might have happened before that contract.

By Mr. ROSS: Permit me to read this language in this letter: "Mr. C. C. Miller was over to Jerome and had a long talk with Mr. McDermott, mining engineer for the United Verde, and he says
190 the Copper Company will close the deal at the expiration of the option and give us the money provided there is no legal technicalities such as Pearsall's lawsuit." (164).

Q. That quotation which I have read states a fact, does it?

By Mr. HOWELL: We object to that as immaterial and incompetent, and in an indirect way seeking to testify to the conclusion as to what another party would do.

By the COURT: Yes, the question is too broad.

By Mr. ROSS: I understood the Court to say he might state what he had been told by Mr. McDermott.

By the COURT: No.

By Mr. ROSS: That is the basis of the knowledge, that he had been over to Jerome and McDermott stated that.

By the COURT: The question is whether McDermott stated that.

By Mr. ROSS: Yes.

By Mr. HOWELL: That is prior to the time of the compromise contract and no sufficient foundation is laid.

By the COURT: Is that prior?

By Mr. ROSS: That is the letter they offered to show that,—Mr. Pearsall testified that he had no reason to believe the dismissal of the suit was necessary in order to close the contract. This states that the Millers have been advised by McDermott, the mining engineer, that the only thing that stands in the way of closing the deal
191 is the pending litigation.

By the COURT: Answer the question whether that statement was made to you?

A. Yes, sir. (165).

Q. Mr. Miller, state why you asked Mr. Pearsall, in the conversation which he has narrated, to go over to the court and dismiss the pending lawsuit? (167).

By Mr. HOWELL: We object to that as immaterial,—what was in his mind.

By the COURT: Answer the question.

A. I was very anxious to get the pay from the United Verde Copper Company for the claims.

Cross-examination:

I did not fully pay Lasbury for his interest and stock in December, 1907, because I wanted the money for the West Brooklyn and White Rock claims.

Redirect examination:

By Mr. HOWELL: Now we would like to have counsel give us those two deeds.

By Mr. ROSS: Before closing I would like to offer the statement I made attached to the deposition of Will L. Clark, (168) beginning on page 65, now in the record.

By Mr. HOWELL: That statement may be considered as evidence without being sworn to.

192 We are through with the exception of what may be suggested by the deeds and option.

Plaintiff's Exhibit "S," being a deed from A. V. Miller and C. C. Miller to the United Verde Copper Company, dated the 4th day of September, 1906.

Plaintiff's Exhibit "T," being a deed dated the 17th day of December, 1907, from A. V. Miller to Ada M. Miller.

(Testimony closed in open court.)

193 *List of Exhibits.*

PLAINTIFF'S EXHIBIT "A."

A stipulation in the case in the District Court of Douglas County, Nebraska, entitled Brooklyn Mining & Milling Company, Plaintiff, v. Charles C. Miller, George B. Lasbury, Ada M. Miller, Charles C. Miller and George Miller, Defendants, to take the testimony on oral questions and answers, commencing on the 25th day of August, 1908, and continuing from day to day until the taking of testimony shall have been completed by either or both parties to that action, of any witness desired in that case for the use of either party thereto in the trial of said cause. (170-171.)

PLAINTIFF'S EXHIBIT "B."

A stipulation in the case in the District Court of Douglas County, Nebraska, entitled The Brooklyn Mining & Milling Company, Plain-

tiff, vs. Charles C. Miller et al., Defendants, that the testimony taken in Yavapai County, Arizona, on the 25th to 28th days of August inclusive, 1908, in said cause, may be transcribed and certified by the Notary Public who took the same, and waiving the signatures of the witnesses to said deposition. (172.)

194 PLAINTIFF'S EXHIBIT "C."

Deposition of C. C. Miller, a Witness on Behalf of the Defendants, Taken at Yavapai County, Arizona, in the Case in the District Court of Douglas County, Nebraska, Between the Parties to this Action.

Direct examination by Mr. Ross:

I am one of the defendants in this suit. The 175,000 shares of stock of the Brooklyn Mining & Milling Company which were tendered to that Company in open court in the District Court of this County on January 2, 1908, were all of the shares then owned by myself, George B. Lasbury and A. V. Miller, in said Company. Prior to that time I had a proposition of settlement of the pending litigation between the Brooklyn Mining & Milling Company and myself and others. I am acquainted with the handwriting of Charles W. Pearsall. (175.)

Witness identifies and counsel introduces in evidence the following document:

"Made in Duplicate.

(Original.)

OMAHA, *Feb.* 9, 1907.

Chas. W. Pearsall, on behalf of Brooklyn Mining Company offers as a matter of compromise only, this offer to hold good for thirty days from this date, to dismiss suit now pending in the 4th judicial district, Arizona, Yavapai County, entitled Pearsall vs. Miller,
195 et al., for and in consideration of eight thousand five hundred dollars ($8500.00) cash to be paid to the company on dismissal of said suit, also conveyance to said company of mining claims known as Midway, Empress, North Brooklyn, East Brooklyn and South Brooklyn (this agreement in no way (175) recognizing the validity of any claim of title in and to said E. Brooklyn and South Brooklyn claims to be in anybody but said Brooklyn Company) also receipt to said company in full for all alleged claims for services or indebtedness of whatsoever nature of C. C. Miller, A. V. Miller and George B. Lasbury, company to have privilege of removing timbers, etc., from shaft of West Brooklyn, company to waive accounting for silica heretofore removed from West Brooklyn claim. This offer made with the understanding that amount of purchase price of West Brooklyn and White Rock claims is $20,000.00. If purchase price exceeds $20,000.00, this offer is void.

CHAS. W. PEARSALL,
For Brooklyn Mining Co."

I never had any conversation with Mr. Pearsall nor with any one representing the Brooklyn Mining & Milling Company with reference to the allowance which should be made to me and my associates for doing the assessment work for 1907 upon the mining claims which were required to be deeded to the Company. There
196 was never any discussion concerning the doing of that work at the rate of $50.00 per claim. I am familiar with the deed from C. C. Miller, A. V. Miller and George B. Lasbury to the Brooklyn Mining & Milling Company, covering the claims which I have just mentioned, which deed was tendered to the Brooklyn Mining & Milling Company on January 2nd as heretofore stated. (176.) I am familiar with the circumstances under which that deed was delivered to Norris and Ross. A. V. Miller told me and he told Norris & Ross to have the deed put on record and delivered to the proper parties. That deed was delivered to Norris & Ross to carry out partly the agreement that Mr. Lasbury and him made with Mr. Pearsall sometime in August, 1907. My brother's idea was that the delivery of this deed was to carry out part of that agreement. (177.) The agreement of August 27, 1907. The signature appearing on the back of certificates Nos. 80 and 90 of the capital stock of the Brooklyn Mining and Milling Company, being respectively for 39,000 and 19,000 shares, is the signature of A. V. Miller; they were signed in my presence. They were delivered to Norris & Ross by A. V. Miller the same day I delivered the deed. Directions were given by A. V. Miller to Norris & Ross to have them delivered to Mr. Pearsall. I know what instructions were given. Those two certificates were delivered to Norris & Ross to carry out part of that
197 agreement of August 27, 1907. I was present in court at the time that tender in question was made. These stock certificates which we have mentioned, and the deed which we have introduced, were then offered by Mr. Norris to the Brooklyn Mining & Milling Company in open court. At the time the contract of August 27 was made the United Verde Copper Company had a conditional contract for the purchase of the West Brooklyn mining claim. On January 2, 1908, I told Mr. Norris to deliver the deed to the United Verde Copper Company. (179.) At the time the contract of August 27 was made there was a deed held in escrow conveying this property from me and my brother to the United Verde Copper Company. I don't know whether the deed was delivered; he said he would deliver it and afterwards told me that he had delivered it.

Cross-examination by Mr. HOWELL (180):

I couldn't tell the exact date when the deed from the Millers and Lasbury to the Millers covering four or five claims, was delivered, it was probably two months before the first day of January, 1908. Norris & Ross were my attorneys and also attorneys for A. V. Miller in this litigation. We turned it over to them as our attorneys. I never, myself, turned that deed over to any one else except my attorneys. A. V. Miller never turned it over to any one else
198 so far as I know, except to me to be by me turned over to our attorneys. A. V. Miller and Lasbury and I were work-

ing jointly in these matters. I don't know whether Norris & Ross were also attorneys for Lasbury. I turned over to Norris & Ross a great many other papers relative to this litigation from time to time, as my attorneys. All papers that I had pertaining to this litigation at all I turned over to my attorneys. (181.) That deed was turned over for immediate delivery, and that was the order given to the attorneys. I turned over this deed and these certificates of stock at the same time to my attorneys, with the purpose and under instructions to immediately deliver the deed to the Brookyn Mining & Milling Company. I don't think I had much conversation with regard to the stock.

Q. You gave them some directions with reference to carrying out this August 27 contract?

A. Just as soon as they could. As soon as they could find some one to deliver to. At that time I dropped my connection with them and paid no more attention to them until some time later. I left it entirely thereafter to my attorneys. I had no correspondence in any way, no, with Mr. Pearsall. I immediately turned these papers over to Norris & Ross and gave them orders to act. That is all. (182.) I had at that time received some pay from the United Verde Copper Company for this West Brooklyn claim. I don't think I, personally, had received any money from them on the purchase price at the time I delivered that deed. I don't know whether A. V. Miller or Lasbury, or any one acting for me at that time received any money on the purchase price of this claim. (183.)

Q. Then at that time you had not closed the deal with the United Verde Copper Company for the purchase of this West Brooklyn claim?

A. The United Verde always held an option on them since we have done business, at the time they took the option they took a deed to the property. That was not a sale to protect them for moneys advanced to me otherwise. At the time I delivered this deed, offered in evidence, to my attorneys the sale of the West Brooklyn claim had been completed to the United Verde.

Q. If it had been completed you would have received the money?

A. No, sir; we wasn't to receive the money until the 1st day of January, all of it. I received $2000.00 on this claim. (184.) We received it about December 15. I don't remember whether I gave a note or receipt, it was some kind of a paper for $2000.00.

Q. It was a due-bill, wasn't it?

A. Something of that order. It was a paper showing that we had received $2000.00 from them as part of the purchase price. I don't know who has that paper now. I think the paper was written out by Mr. Norris. I delivered it to him. I heard he was the attorney for the United Verde Copper Company; I suppose he is, I could not say for certain. We have received money from the United Verde Copper Company since then. (185.) It was supposed to apply on the purchase price. We received a voucher for $600.00 about the 20th of last June; they always pay in vouchers. That was not in payment for silica fur-

nished by me to them. I don't know where that voucher is; I put it in the bank when I got the money; I got cash. These are the only sums I ever received in payment of the purchase price of this claim. The $2000.00 was paid in the form of a voucher. I deposited that in the Bank of Arizona in Prescott, Arizona, and got credit for it. I don't remember the exact date; it was about the middle or about the 20th of December, 1907. Those two payments also included another claim I was negotiating with the United Verde Copper Company. (186.)

Q. Isn't this true, that they advanced you this $2000.00 when they did because you were furnishing them with silica from the West Brooklyn mine and if they decided not to take the West Broklyn mine and the White Rock claim, then they were to reimburse themselves out of the silica you were to furnish them?

A. The $2000.00 payment didn't have anything to do with the silica. They advanced me $2000.00 at that time and I agreed with them then if they didn't take the property, the White Rock claim and the West Brooklyn mining claim they could deduct
201 from the silica I was to furnish them the amount they advanced to me, being $2000.00. I gave them something to show that I had borrowed $2000.00 from the United Verde Company at that time. I never understood it was a loan. I always figured it was part of the purchase price and I expected to get the full amount on the first day of January. That was in my mind. (187.) The United Verde Copper Company advanced me $2000.00 and took from me evidence of indebtedness at that time. When the time came to settle up for the West Brooklyn and White Rock claims they were certainly to deduct the $2000.00 out of the purchase price.

Q. Now, then, they never settled or deducted that money yet, have they?

A. Yes, sir. (188.) It was some time either in February or March, 1908. They paid me nothing at that time on the purchase price of this claim from which they deducted this $2000.00. They deducted it from the monthly silica vouchers. I had in the meantime been furnishing the United Verde Copper Company with silica from the Brooklyn mine.

Q. At what price per ton?

By Mr. Ross: We object to that as immaterial and I advise Mr. Miller he need not answer, because it is outside of this case.

By Mr. HOWELL: We ask it for the purpose of showing this transaction and showing that the transaction is not as the witness stated but there was a transaction with reference to another
202 deal entirely. We now charge that the witness was getting $1.50 at least from the United Verde Copper Company for each ton of silica furnished from this mine and that he was furnishing about 100 tons per day, and that these papers were for the payment of that silica. If the witness does not care to answer it in the face of that charge, all right. (189.)

By Mr. Ross: The question doesn't raise any question as to the

silica shipments or the price of silica or anything of that sort. I am willing Mr. Miller should state the manner, how this was deducted, but the price of the silica—I think that is a thing unnecessary to be disclosed in this case, and a disclosure of this might not be of any particular good to Miller's interest.

A. At what price per ton what?

By Mr. HOWELL: Did you sell silica to the United Verde Copper Company?

A. At what price per ton did we sell silica to the United Verde Copper Company?

Q. Yes.

A. I don't care to answer.

Q. How much gross did you—do you refuse to answer?

A. Yes, sir.

Q. Why do you refuse?

A. Because I don't think it is material in this case. I don't think it is necessary at all.

Q. You are setting yourself up as a judge as to what evidence should go in this litigation?

A. If the Court requires me to answer I would answer very quick.

Q. Do you know this case has to be tried in Nebraska?

A. Yes, sir.

Q. You know we can't get the Court here to supervise your answer.

A. Yes, sir.

203 Q. And knowing these facts and feeling as you do you refuse to answer, is that it?

A. Yes, sir.

Q. Now, then, what was the sum total of silica that you furnished to the United Verde Company up to the time this (190) deduction was made, the $2000.00 in evidence?

A. The sum total in dollars?

By Mr. Ross: We object to that as immaterial and irrelevant.

By Mr. HOWELL: In March, 1908?

By Mr. Ross: There is no issue in the case concerning the amount of the silica payment. This witness is not before the Court in Nebraska and no judgment therein could be entered against him. There is, as I have before stated, no issue in this case as to the amount of silica which has been removed from this claim.

By the WITNESS: I could not answer that offhand. That would take quite a little figuring up and calculation. Do you mean from the time we first commenced to deliver silica to the United Verde Company up to March, 1908?

Q. From the time you got the $2000.00 how much in dollars and cents did you deliver to the United Verde Company, during that time, in silica?

A. From what date, please?

Q. From the time you received the $2000.00 until in March when

you say this $2000.00 was deducted from the silica you sold them?
A. I believe I would just as leave answer that question.

By Mr. Ross: I don't object to that. It is the price per
204 ton I did not think necessary.

A. You mean the amount in dollars received from the time we got the $2000.00 up to and including the month of March, the amount of dollars?
Q. Yes.
A. I could not tell you to the exact dollar. I (191) will make a close guess.
Q. Make it, please.
A. $2000.00.
Q. Just about enough to pay this $2000.00?
A. The amount was between two and three thousand dollars as near as I can guess at it.
Q. That was for deliveries in January, February and March, was it?
A. Yes, sir.
Q. And in payment for deliveries in that time?
A. Yes, sir.
Q. That is, your settlement in March you have reference to in that deal?
A. Yes, sir.
Q. You have been delivering silica ever since to them, haven't you?
A. Yes, sir.
Q. From this same mine?
A. Yes, sir.
Q. And doing it today?
A. Yes, sir.

By Mr. Ross: The objection to that is that it is not an issue in the case, and we move that the answer of the witness be stricken out.

By Mr. HOWELL: And receiving pay from the United Verde Copper Company for this silica you are delivering?

By Mr. Ross: We object to that for the reason that it is irrelevant and immaterial; that it is outside of the issues raised by the pleadings. There is no such allegation in the case that there is such operation going on.

A. Yes, sir.

205 By Mr. HOWELL: That condition of affairs has existed since the first day of January of this year up to the present time?
A. Yes, sir. (192.)
Q. Now in dollars and cents, how much silica have you delivered to the United Verde Copper Company since the 1st of January up to the present time, in round numbers?

By Mr. Ross: We object to that as being immaterial and irrele-

vant. As far as that question is concerned I don't believe the witness is required to answer. It is obviously outside of the pleadings, and not a basis of any possible recovery in the case.

By Mr. HOWELL:

Q. Will you answer the question?
A. No.
Q. Why not?
A. Why not?
Q. Yes.
A. On the advice of counsel.
Q. You have been taking silica out from the West Brooklyn mine ever since the 1st of January, haven't you?

By Mr. Ross: We object to this on the further ground that it is improper cross examination; obviously outside of the limits of the direct examination, and outside of anything that could possibly be read into the pleadings.

By Mr. HOWELL: Answer the question, please.
A. Yes, sir.
Q. And delivering it to the United Verde Copper Company for its use in smelting work near these mines, wherever they are?
A. Yes, sir.

206 Q. You have been receiving pay from the United Verde Copper Company, not asking you how much, you have been receiving pay as you delivered the silica, have you not?

A. Yes, sir.
Q. For the silica?
A. Yes, sir; good pay, too. They are good people to deal with. Anything you sell them you get your money. (193.) The United Verde Copper Company entered into a written contract with me concerning this West Brooklyn claim, either in September or August, 1906. I think possibly I may have a copy of it at home. I think Norris & Ross have a copy of it. That is a copy of the contract to purchase. It is the only contract I ever had with the United Verde Copper Company for the purchase of this West Brooklyn claim. It had something to do with the White Rock claim; just the White Rock and the West Brooklyn.
Q. Then you have at no time ever had a settlement with the United Verde Copper Company on the sale of this West Brooklyn claim?
A. How do you mean, a settlement? Do you mean I got my money for the claim? (194.)
Q. Any way, whether you got your money or notes for it?
A. They never paid me, no, sir.
Q. They have never given you any notes for it, have they?
A. No, sir. They promised a half a dozen different times to pay the instant this litigation is cleared up. I think the first time was some time the latter part of last year. I don't remember the exact date.

Q. They then told you that they would not have anything more to do with it until this litigation was cleared up, didn't they, or words to that effect?

207 A. No, I didn't say they wouldn't.

Q. What did they say?

A. They said they wanted the litigation cleared up if possible so they could pay the money in full.

Q. They didn't refuse to pay it because of the litigation, did they?

A. I hardly think they will pay it with the litigation still on.

Q. The United Verde Company did not say they would not pay it because of this pending litigation, did they?

A. The only conversation I ever had with them was with Mr. Will Clark. (195.) Mr. Clark did not say he would not take this claim because of this litigation.

Q. He didn't tell you he refused to take it because there was litigation, did he?

A. He didn't want to take it, no.

Q. And therefore, did not take it, isn't that true, because this litigation was on?

A. He didn't pay for it.

Q. He didn't take it, did he, because of that fact?

A. I don't know.

Q. He didn't take it, did he, sir?

A. They have pretty near got it.

Q. How have they pretty near got it?

A. I don't care to answer it.

Q. You refuse to explain how they have pretty near got it?

By Mr. Ross: If you have in mind that contract——

By Mr. Howell: When the witness has refused on his own motion, after getting into a disagreeable position,—to have counsel get him out—I will give you another opportunity, however,

208 to answer that question if you want to. What do you mean by "They have pretty near got it?"

A. The deeds are in their hands.

Q. How do you know?

A. It ain't in my hands.

Q. That is the only reason you know it is in their hands, because it is not in yours? You have never asked them to pay for it, have you?

A. No, sir. (196.)

Q. They have never offered to pay for it, have they?

A. Yes, sir.

Q. When did they offer to pay for it?

A. Offered to pay for it any time.

Q. When was that offer made to pay for it any time?

A. Last December.

Q. Any since that time been made?

A. Yes, sir.

Q. When?
A. About two months ago, probably three months ago, one month ago.
Q. Why didn't you accept it?
A. Why didn't I accept it? They wanted the litigation cleared up if possible.
Q. Then, as I understand it, they offered to pay you for it in December, and you refused to take it, is that right?
A. No, sir. They didn't put the money down and say, I want to pay you for it, they wanted the litigation cleared up and pay the money.
Q. They refused to pay you a cent until you got the litigation cleared up?
A. No, sir; they paid the money.
Q. Beside the $2000.00 and the $600.00?
A. No, sir. Whenever we could—that was for the purchase price at the time we got the $2000.00.
Q. Why didn't you take it?
A. I wanted to give them a clear title.
Q. How much was the purchase price?
A. $10,000.
209 Q. And the White Rock was $10,000?
A. Yes, $10,000.00 each.
Q. In fact, they were not separated, it was $20,000.00 for the two?
A. $10,000.00 for each one.
Q. The only time they ever offered to pay you for it was in December and three months ago and two months ago and about a month ago, is that right?
A. Yes, sir. (197.)
Q. They refused to accept this deed as you understand it, until this litigation was cleared up? Your counsel told you that they would not accept the deed under the present conditions?
A. No, sir.
Q. You don't know whether the deed has been accepted or not, do you, by the United Verde Copper Company?
A. No, sir; I don't know exactly where we do stand on it. I know I haven't got the deed.
Q You are in possession of the claim, aren't you?
A. Yes, sir.
Q. And working it?
A. Yes, sir.
Q. I mean you and Mrs. Ada M. Miller, and Lasbury and the boys, the sons of the deceased Miller, that is who I mean, is that right?
A. Lasbury has nothing whatever to do with it.
Q. Since when?
A. I could not tell the exact time, it is a long time ago.
Q. Give us the month?
A. About July, 1907.

Q. Why did Lasbury sign this contract of August 27, 1907, if he didn't have anything to do with it?

A. I don't know that.

Q. Well, that was part of your deal, wasn't it?

A. I don't (198) know anything about that at all. In
210 fact, I didn't have anything to do with making up that agreement.

Q. You signed it?

A. I did, reluctantly.

Q. You regretted it afterwards, that you had signed it?

A. Yes, you bet.

Q. You have been trying to get out of it ever since? This contract?

A. No, I can't say I have. I want to fulfill that contract as long as I signed it. I want to fulfill it to the letter, just exactly as the agreement says.

Q. Did Lasbury sell his interest out in July, 1907, to some one?

A. Somewhere about that time he sent a deed down here for his interest.

Q. To whom?

A. Miller Brothers.

Q. That is yourself and your brother, that is the deed?

A. Yes, I didn't take the deed up at the time he sent it. It was here quite a while before we took the deed up, that is took the deed out of the bank.

Q. How much did you pay him for that?

A. I don't think I care to answer that, Mr. Lasbury can answer that himself. (199.)

Q. Do you refuse to answer?

A. The question was, how much did I pay?

Q. The question was, how much was he paid for that deed to Miller Brothers?

A. I could not swear positively, I don't know.

Q. Well, about how much?

A. Would that answer the question, about how much?

Q. Yes, about how much?

A. I think about $2000.00 cash money.

Q. Now, we have Lasbury out. Then you and Mrs. Miller, the widow of A. V. Miller, and the two sons of A. V. Miller, are working this claim, the West Brooklyn, are you?

A. Yes, sir.

211 Q. Now, before Lasbury was out of this you had been selling and receiving pay for silica, hadn't you?

A. Yes, sir.

Q. Did you send Lasbury any money for his portion of it?

A. No, sir.

Q. Then the $2000.00 was all you sent him, or any of you, that you know of, is that right?

A. As far as I know. You must remember that Mr. Lasbury was interested in the West Brooklyn, there was a whole lot of silica

taken out of the White Rock. We delivered silica from the White Rock for several months and he never asked for anything.

Q. You haven't made any new arrangements for the closing (200) of the option with the United Verde Copper than that contract you have referred to, that is in writing, have you?

A. The contract was made sometime in the year 1906.

Q. You have made no other arrangement toward closing the option than that?

A. No other option has been made than that.

Q. Now, Mr. Miller, why did you direct Norris & Ross to put that deed on record at once when you didn't close the deal with the United Verde Copper Company?

A. We wanted to fulfill our part of the agreement of August 27.

Q. You delivered this deed to your attorneys and instructed them to put it on record at once. Why did you do that if you hadn't made this sale to the United Verde Copper Company?

A. What deed have you reference to?

Q. The deed to the Brooklyn Mining & Milling Company.

212 I am asking about this deed here now.

A. Deed to the five claims? (201.)

Q. Yes, whatever they were?

A. For the simple reason of clearing the matter up and fulfilling the agreement.

Q. Why did you make this direction to your attorneys to put this deed on record at once when there was nothing else being done towards closing the contract and fulfilling the agreement?

A. There had been a start made.

Q. You never notified anybody that you had made such a start at that time but your attorneys, did you?

A. Possibly Lasbury was notified, I couldn't say.

Q. Nobody outside of that possibility?

A. Possibly.

Q. Didn't you write Lasbury along towards the 1st of January of this year that this deal between you and the United Verde Company had fallen through?

A. No, sir.

Q. Anything that way?

A. No, sir.

Q. Did you wire him to that effect?

A. No, sir.

Q. Did he wire you at that time that the deal had fallen through, or did you answer him in response to a wire that it had fallen through?

A. No, sir.

Q. Not in any respect?

A. No, sir.

Q. Did you write or wire Ada M. Miller to that effect?

A. No, sir.

Q. At no time?

A. No, sir.

Q. You kept up a correspondence with Lasbury, didn't you, and do now?

A. No, sir; I haven't written Lasbury for a good many months. Not in the year 1908.

Q. Did you direct Lasbury by letter, or Mrs. Miller by letter, to call up Mr. Pearsall about the 30th of December last, con-
213 cerning this claim and this contract of August 27, 1907?

A. No, sir; I told them to keep away from Pearsall as far as they could. (202.)

Q. Why, at that time, were they to keep away from Pearsall?

A. Because we wanted the deal to go through. Our fulfillment of the contract and the purchase price from the United Verde Copper Company.

Q. This deed that you delivered to your attorneys was delivered by you after the death of your brother?

A. The deed for them five claims?

Q. Yes.

A. No, before.

Q. Well, was the deed delivered by you to your attorneys to the United Verde Copper Company after the death of your brother?

A. That deed was delivered to our attorneys on the day the option was made, some time in the year 1906, the fall of 1906, that is all I know about that deed.

Q. The deed was delivered with the option?

A. Yes, sir.

Q. To the attorneys, Norris & Ross?

A. Yes, sir; they took the deed at the time they took the option.

Q. You have had nothing to do with the deed since?

A. No, sir; never had it in my hands since.

Q. Have you given any directions since?

A. Yes, sir.

Q. When?

A. On the second day of January, 1908, I told Mr. Ross to give it to the United Verde Copper Company.

Q. That is the only conversation you had with any one concerning that deed after it was put with the contract originally (203) on the 2nd day of January, 1908, is it?

214 A. I think so, I never gave it much thought, the deed business; all I was after was the purchase price on the 1st day of January, 1908.

Q. When was it you directed Lasbury to keep away from Pearsall, about the last of January, 1907?

A. I never directed Lasbury, you misunderstand me, it was Mrs. Miller I directed to keep away from him.

Q. Where is Mrs. Miller now?

A. Dewey.

Q. In this County and Territory?

A. Yes, sir.

Q. Is she in the city here now?

A. No, sir.

Q. How far is Dewey from Prescott?

A. About 20 miles.

Q. Was she here last night?
A. Yes, sir.
Q. When did she go home, this morning?
A. Yes, sir.
Q. You received a telegram from Lasbury on or about the 30th day of December last year concerning this contract, didn't you?
A. I think so.
Q. Have you a copy of that telegram?
A. No, sir.
Q. Do you know where it is?
A. To the best of my recollection after reading it I tore it up and threw it away.
Q. The original of that telegram that you received is not in existence?
A. No, sir.
Q. Then if we are to get that telegram we will have to get a copy of it?
A. That is right.
Q. Do you remember the contents of that telegram?
A. I think I—I don't know the exact words—I can repeat the substance of it.
Q. Well, give us the substance of it.
A. "Can do nothing with Pearsall, go ahead with the deal." (204.)
Q. When did you receive that?
215 A. I don't know. I think it was before the 30th of December.
Q. Had you directed him to do something with Pearsall?
A. No, sir.
Q. Why should he send such a telegram to you?
A. I suppose it was dictated by Mrs. Miller.
Q. If dictated by Mrs. Miller, why should she dictate such a telegram to you?
A. I don't know.
Q. You acted on it?
A. It didn't make any difference, the deal was going right ahead.
Q. You could not tell why that telegram was sent you?
A. No, sir; it didn't make any impression on me.
Q. You didn't inquire of any one what it meant? Just let it go?
A. No, sir. That is right.
Q. This contract of August 27, 1907, was made in duplicate or more than one copy was made of it, wasn't there, you kept a copy of it and others kept copies?
A. I thought I got a copy at the time.
Q. It was the intention that all parties interested who wanted copies should have copies?
A. Yes, sir.
Q. What did you do with your copy?
A. I think I mailed them to Norris & Ross.
Q. You never showed it to the United Verde people, did you?
A. Personally, me?

Q. Yes.
A. I don't remember of showing it to them.
Q. Never told them about it, either?
A. Oh, yes. (205.)
Q. When?
A. Almost as soon as I got it, I think.
Q. Who did you tell it to?
A. Mr. Will L. Clark.
Q. He is the Assistant General Manager?
A. Yes.
216 Q. How long did you retain it in your possession before you turned it over to your attorneys?
A. Possibly 24 hours. I saw Mr. Clark quite frequently.
Q. You left matters entirely to your attorneys after you turned the papers over to them, didn't you? You didn't take part in the matters after you turned the matters over to your attorneys?
A. Yes.
Q. You gave them authority to contract, they represented you in all matters?
A. Yes, sir; with Norris & Ross, with them, those attorneys?
Q. Yes.
A. Yes, sir.
Q. They were employed in all these matters that you have testified to?
A. Yes, sir.
Q. With full authority to act for you, is that right?
A. Yes, sir.
Q. And negotiate for you, is that correct?
A. Any little things. They never done anything without first consulting me.
Q. Well, with reference to this matter we are now fighting over, you left it entirely with them?
A. Yes, sir.
Q. Do you remember, Mr. Miller, of sending a telegram to Mr. Lasbury about the 1st of November last, saying that the United Verde, or Mr. Clark, wanted two weeks' extension on the option, that being shortly after Mr. Clark's return from (206) England?
A. I think there was something like that sent, either a telegram or a letter.
Q. You stated in that that you had granted the extension?
A. I think so.
Q. You had granted the extension, hadn't you, two weeks?
A. Yes, sir.
Q. That was about the 1st of November, 1907, wasn't it,
217 last fall?
A. I would not be positive about the date.
Q. It was around about there, wasn't it?
A. As near as I can remember, it was.

Redirect examination by Mr. Ross:

We are to get a settlement from the United Verde Copper Company on the purchase price immediately on the clearing up of this

litigation. There has never been a time since August 27, 1907, when we were able to tender the United Verde Copper Company a clear title, unclouded by litigation, to the West Brooklyn claim. The agreement of option which I speak of was extended several different times. (207.) And the extension of this option run up to and beyond the first day of January, 1908, or up to January first. If this litigation was ended today we could close the sale with the United Verde, and not only that but I could have had it two years ago if we could only have cleared the litigation. Mr. Pearsall is the only man that has kept us out of the money. It has always been ready for it, we could get it this evening if this litigation was ended. When I got the $2000.00 from the United Verde Copper Company in December it was to apply on the purchase price of the West Brooklyn (208) and White Rock together. The West Brooklyn was never referred to as a single claim. When they bought they bought both claims; when they pay for it they pay for both claims. When, on January 2, 1908, it became evident
218 that plaintiff did not intend to dismiss the pending litigation I had to make arrangements to secure the repayment of that money in some way or other. (209.) I don't know the slightest reason why Mrs. Miller should have called on Mr. Pearsall at Omaha. I never authorized her or Lasbury, or suggested to either of them, that they carry on any negotiations at that time with Mr. Pearsall.

(Counsel introduces deed, Defendants' Exhibit "C.")

I never discussed the agreement of August 27, 1907, with Mr. Pearsall, or with any one representing the Brooklyn Mining & Milling Company, before I signed it.

Recross-examination by Mr. HOWELL:

At the time this contract of August 27, 1907, was entered into I don't think the United Verde Copper Company had an option which extended up to January 1, 1908, (210). I couldn't say positively when it extended to, I couldn't state that out of memory whether this extension I gave them carried it beyond January 1, 1908.

Q. You answered your counsel that you had extended this option even beyond the 1st of January, 1908.

A. What was the question?

Q. You answered your counsel when he said you had made extensions of the option beyond the 1st of January, 1908, that is correct?

219 A. I feel positive it was extended up to January 1, 1908.

Q. How about beyond?

A. I could not say beyond.

Q. You don't know whether it was or was not, is that what you mean to say now?

A. I am unable to say when the option expired.

Q. If it did expire before the first of January it wasn't renewed, was it?

A. I don't think it was.

Q. It had just about expired when you sent this telegram to Lasbury, hadn't it, about the 1st of November, 1907?

A. That was about the time that the option run out, one option.

Q. You sent this telegram as you stated a while ago? (211.)

A. Yes, sir.

Q. When you repaid this $2000.00 in March, I believe you stated, did you take up your note or due-bill that you had given to the United Verde?

A. No, sir.

Q. They have still got that as far as you know?

A. As far as I know they have.

Q. Then that arrangement was entered into because you were unable, as you say, to deliver title, the arrangement to pay back that $2000.00 for that voucher? Why did they advance you $600.00 thereafter when the conditions were the same, as purchase price?

A. I couldn't tell the reason exactly, their reason; they done it, that is all I know.

Q. They said to you that you had to pay back that $2000.00 because you could not carry out the contract, and you did it?

A. Yes, sir.

Q. After that they advanced you $600.00?

A. Yes, sir.

220 Q. You claim that was on the purchase price of the West Brooklyn and the White Rock?

A. Yes, sir.

Q. Did you get anything from them in the way of a note or due-bill?

A. Didn't get a due-bill.

Q. Or note?

A. No, sir.

Q. What writing or promise?

A. No evidence whatever.

Q. They charged it to you?

A. Yes, sir.

Q. You paid that back from the silica sales the same as you had the $2000.00, is that right?

A. Yes, we have paid it back.

PLAINTIFF'S EXHIBIT "D."

Contract dated August 27, 1907, between C. C. Miller, A. V. Miller, and G. B. Lasbury, of the one part, and Brooklyn Mining & Milling Company of the other part, being the same as set out in the complaint in this action. (See folios 8 to 18 of this Abstract of Record, and pages 213 to 216 of Reporter's Transcript).

Endorsed: "Filed and recorded at request of Thos. C. Job, Dec. 22, A. D. 1908, at 9:46 o'clock A. M., Book 8 Agreements, pages 447-449, Records of Yavapai County, Arizona, J. C. Bradbury, County Recorder, by A. C. Gilmore, Deputy Recorder."

PLAINTIFF'S EXHIBIT "E."

Letter dated Omaha, Neb., Dec. 14th, 1906, from G. B. Lasbury to Bank of Arizona. (See folios 336 to 338 of this Abstract of Record.)

221 PLAINTIFF'S EXHIBIT "F."

Draft for $1586.00 drawn by The Bank of Arizona, Prescott, Arizona, dated Dec. 13, 1907, on The Nat'l City Bank, New York City, in favor of G. B. Lasbury, with endorsements and stamps thereon. (See folios 338 and 339 of this Abstract of Record).

PLAINTIFF'S EXHIBIT "G."

Letter dated Dec. 7th, 1907, from G. B. Lasbury to Cashier Bank of Arizona. (See folios 340 and 341 of this Abstract of Record).

PLAINTIFF'S EXHIBIT "H."

Letter dated April 23rd, 1908, from G. B. Lasbury to Bank of Arizona, with receipt of C. C. Miller with date appearing thereon. (See folios 342 to 344 of this Abstract of Record.)

PLAINTIFF'S EXHIBIT "I."

Deposition of Thomas H. Ensor. (See folios 473 to 482 of this Abstract of Record, and pages 217 to 221 of Reporter's Transcript.)

PLAINTIFF'S EXHIBIT "J."

Deposition of Charles J. Collins. (See folios 483 to 489 of this Abstract of Record, and pages 222 to 226 of Reporter's Transcript).

222 PLAINTIFF'S EXHIBIT "K."

Deposition of Edward W. North. (See folios 491 to 498 of this Abstract of Record, and pages 227 to 232 of Reporter's Transcript.)

PLAINTIFF'S EXHIBIT "L."

Judgment Roll in the case in the District Court of Douglas County, Nebraska, entitled "Brooklyn Mining & Milling Co. Plaintiff vs. Charles C. Miller, George B. Lasbury, Ada M. Miller, Charles C. Miller, and George Miller, Defendants," being a certified copy of the following pleadings and documents in this action, to-wit:

Petition: (See folios 112 to 156 of this Abstract of Record, and pages 235 to 244 of Reporter's Transcript). Endorsed: "Doc. 100,

No. 178. In the District Court of Douglas County, Nebraska, Brooklyn Mining & Milling Company, Incorporated, Plaintiff vs. Charles C. Miller, George B. Lasbury, Ada M. Miller, Charles C. Miller, and George Miller, Defendants, Petition, Nelson C. Pratt and Jefferis & Howell, Attorneys for Plaintiff, District Court, Douglas County, Nebraska, Filed Jan. 28, 1908, Robert Smith, Clerk, Pd. 5.00."

Summons: (See page 245, Reporter's Transcript.) Endorsed: "Doc. 100 No. 178, District Court, Douglas County, Brooklyn Mining & Milling Company, Incorporated, vs. Charles C. Miller,
223 et al., Summons, Amount claimed of the Defendant by the Plaintiff is $—— and Equitable relief, Jefferis & Howell, Plaintiff's Attorneys, Received Sheriff's Office, Jan. 28, 1908, Douglas County, Nebraska, District Court, Douglas County, Nebraska. Filed Jan. 29, 1908, Robert Smith, Clerk, 180."

Sheriff's Return of Summons: Showing personal service January 28, 1908, on George B. Lasbury and Ada M. Miller. (See pages 245 and 246, of Reporter's Transcript.)

Demurrer to Petition: Endorsed: "Doc. 100 No. 178, District Court, Douglas County, Nebraska, Filed Mar. 2, 1908, Robert Smith, Clerk." (See pages 246 and 247 of Reporter's Transcript.)

Answer: of George B. Lasbury and Ada M. Miller. Endorsed: "Doc. 100 Page 178, In the District Court of Douglas County, Nebr., Brooklyn Mining & Milling Company, incorporated, Plaintiff vs. Charles C. Miller, et al., Defendants, Answer, Hall & Stout, Attorneys, for Geo. B. Lasbury & Ada M. Miller, District Court, Douglas County, Nebraska, Filed Apr. 13, 1908, Robert Smith, Clerk." (See folios 157 to 165 of this Abstract of Record, and pages 247 to 249 of Reporter's Transcript.)

Reply: of Brooklyn Mining & Milling Company to Answer of Defendants. Endorsed: "100-178, Brooklyn Mining & Milling Co.
v. Lasbury et al., Reply, District Court, Douglas County,
224 Nebraska, Filed May 29, 1908, Robert Smith, Clerk." (See folios 166 to 169 of this Abstract of Record, and pages 249 and 250 of Reporter's Transcript.)

Decree: (See folios 170 to 182 of this Abstract of Record, and pages 250 to 253 of Reporter's Transcript.)

Certificate: of Robert Smith, Clerk of the District Court of Douglas County, Nebraska, to all of the foregoing. (See page 253 of Reporter's Transcript.)

Certificates: one of the presiding Judges and of the Clerk of said Court as follows:

"STATE OF NEBRASKA,
Douglas County, ss:

I Abraham L. Sutton, one of the Judges and the presiding Judge of the District Court of the Fourth Judicial District of the State of Nebraska, do hereby certify that Robert Smith, who signed the above certificate, was, at the time of signing the same and is now, Clerk of the said District Court, in and for Douglas County, State of Nebraska, in the Fourth Judicial District of said State, duly elected, commissioned and qualified; that said Court is a Court of

Record; that the said Clerk has by law the custody of the Records and seal of said Court. That said attestation is in due form and by the proper officer according to the laws of the State of Nebraska, and that the above signature of said Clerk is genuine.

225 Witness my hand at Omaha, County and State aforesaid, this 11th day of March, A. D. 1909.

[SEAL.] ABRAHAM L. SUTTON, *Judge.*"

"STATE OF NEBRASKA,
County of Douglas, ss:

I, Robert Smith, Clerk of the District Court, in and for Douglas County, in the Fourth Judicial District of the State of Nebraska, said Court being a Court of Record, do hereby certify that the Honorable Abraham L. Sutton, whose name is subscribed to the annexed and foregoing certificate, was at the time of the signing thereof and now is one of the Judges of said District Court, duly elected, commissioned and qualified, and that the said signature is genuine.

In Witness Whereof, I have signed my name and affixed the seal of said Court, at my office, in the City of Omaha, in said Douglas County, State of Nebraska, this 11th day of March, A. D. 1909.

[SEAL.] ROBERT SMITH, *Clerk.*"

(See pages 253 and 254 of Reporter's Transcript.)

PLAINTIFF'S EXHIBIT "M."

Deposition of Will L. Clark, a Witness on Behalf of Defendants, Taken at Yavapai County, Arizona, in the Case in the District Court of Douglas County, Nebraska, Between the Parties
226 *to This Action. (This is Also Defendants' Exhibit No. 3.)*

Direct examination by Mr. Ross:

I was Assistant General Manager of the United Verde Copper Company on January 1, 1908, and have been at all times since then. I am familiar to some extent with the West Brooklyn mining claim situate near Dewey, Arizona, known as the silica claim. I have been there a number of times.

Q. It is alleged in this case and admitted that on August 27th, 1907, the United Verde Copper Company held an option from A. V. Miller and C. C. Miller to purchase the West Brooklyn mining claim for $10,000.00 under an agreement, as set out in the complaint in this action, made between the Brooklyn Mining & Milling Company and A. V. Miller, C. C. Miller and George B. Lasbury, the terms of which refer to that option held by the United Verde Copper Company and refer to a sale of that property to the United Verde Copper Company on or before the 1st day of January, 1908. Now, on the 1st day of (278) January, 1908, you may state whether or not an option to purchase, as extended, was still in force?

A. We considered it was, yes.

Q. If anything was done on the 1st or the 2nd day of January, say the 2nd of January, since the 1st was a legal holiday, in relation to the delivery of the deed purporting to convey the
227 West Brooklyn mining claim to the United Verde Copper Company, you may state what was done, or what you know about it?

A. I received in the mail, for the United Verde Copper Company, a deed such as described. Do you want me to state concerning the White Rock claim?

Q. No, that is not concerned in this action.

A. That cuts some figure with our option.

Q. If you feel that it is desirable to state in relation to that matter later on you may do so. Was the purchase price of the West Brooklyn mining claim paid to Miller Brothers at the time that deed was delivered?

A. Not entirely.

Q. Has it ever been entirely paid to Miller Brothers?

A. No.

Q. Upon the happening of what contingency would it be paid to Miller Brothers?

A. On the delivery of the title to the claim.

Q. That has been the position of the United Verde for a long time, in relation to that transaction?

A. Yes.

Q. If no litigation had been pending affecting the title to the West Brooklyn mining claim and the Miller Brothers had been in a position to deliver a clear, marketable title on the 2nd day of January, 1908, would the transaction have been closed at that time, in your judgment? (279.) Insofar as the West Brooklyn claim is concerned, I don't care anything about the White Rock.

A. Yes, it was understood we would take it and pay for it.

Q. And if the title were cleared today and the proper title presented, you would close the transaction as to the West
228 Brooklyn?

A. Yes, that is the present instructions.

Cross-examination by Mr. HOWELL:

Q. When did you receive these instructions, Mr. Clark, and from whom?

A. About November, 1907, from the president of the company, W. A. Clark, he and his son were here.

Q. You didn't communicate that to Lasbury, did you?

A. Yes, sir.

Q. When?

A. Yes, early in December, 1907, Miller stated that he would have to—or the two Millers, I think they were both present, they stated that they would have to have money. That was the first time I knew of the litigation. I was away, going East about that time, and I made arrangements that they (280) should be furnished with whatever money they required.

Q. Did they give you a note or evidence of indebtedness for the money advanced?

A. I don't exactly recall, I think Mr. Norris took some agreement or note, or something of the sort.

Q. Wasn't this about the way it was done, to refresh your memory. That you loaned them some money at that time and took some evidence of indebtedness, and that they were to supply you with silica, and after you consummated the deal you were to take the property and pay the balance of the purchase price, and if not you were to take this money out of the price of the silica advanced?

A. As I said, I left here about that time. There wasn't
229 any official here with executive power to act in that matter.

My instructions to the attorneys were to protect our interests. I recollect there were a number of agreements made. I could not say unless I knew what the agreements were.

Q. You never closed the option to purchase the property and would not except upon the conditions?

A. The conditions of title, yes. (281.)

Q. You never notified them that you would take the property unless they did certain things themselves?

A. Yes, I notified them we would take the property.

Q. On the conditions you stated?

A. At any time they could convey the title.

Q. This option was not for the West Brooklyn, it was for the West Brooklyn and the White Rock,—$20,000.00 for the two claims?

A. That was the original option.

Q. That was in writing?

A. Yes, sir.

Q. This subsequent option, what was that, verbal or in writing? There was no price stated on the White Rock claim or the West Brooklyn Claim in this written option?

A. I think not.

Q. $20,000.00 for the two claims?

A. I think so.

Q. You never decided to purchase either of the two claims for $20,000.00?

A. No.

Q. Your company is a corporation?

A. Yes, sir.

Q. There was no resolution or action taken by your company concerning the acceptation of this option? (282.)

A. I could not say, the office of the company is not here in
230 this Territory.

Q. You have never heard of any such action on the part of the officers of the company in board meeting, have you?

A. I only know that the officials of the company were apprised of this transaction.

Q. Answer my question, yes or no, you never heard of any official action taken by the Board of Directors of the company?

A. No, I never have.

Q. You know Mr. Job, do you not?

A. Yes.

Q. You had a talk with him on or about the 14th of last March concerning this transaction?

A. Yes.

Q. You are a pretty busy man, Mr. Clark?

A. Yes, sir.

Q. During the course of the year you have a great many transactions of large and vast importance, is that not true?

A. Yes, we have a large business here.

Q. Some of these matters must be recalled to you by association and investigation of data at times, isn't that true, association of ideas?

A. Yes, my habit of transacting business is to do it on paper. (283.)

Q. In order to refresh your memory as to this conversation, when you spoke of an option, as I understood, that option you spoke of was subsequent to the 27th of August, 1907, that you had an understanding with them about this claim, Am I correct about that or not? I want to know.

A. I don't recall that.

Q. Now, I will ask you if you did not state to Mr. Job that some time subsequent to the 27th of August, 1907, and prior to the 1st day of January, 1908, you entered into a verbal arrange-
231 ment with the Millers whereby two different courses might be followed with the United Verde Copper Company at its option, that is, the United Verde Copper Company might pay a certain price for silica and let the ownership of the West Brooklyn rest in the Millers, or it might pay a lower price and later take over the ownership of the West Brooklyn; that the Millers were asking more for the West Brooklyn than the United Verde Copper Company was willing to pay for it, is that a fact, that that is what was stated to Mr. Job at that time, or isn't that a fact?

A. No, I did not intend to convey to Mr. Job exactly that statement. (284.)

Q. Well, if not exactly that statement, in what way would you modify it? Give us your version of it at this time, in that particular.

A. I recited to Mr. Job these facts; that owing to the heavy decline in the price of copper it became necessary for a copper mining company of this sort to reduce their expenses, and along this line I told the Millers that we would not pay the then contract price for silica any longer and unless a reduction could be had we would use silica from our own deposit here.

Q. What did you say to them with regard to the ownership resting in the Millers if they furnished you silica at a reduced price, if anything?

A. It was then also stated by me that we would not take the two claims at $20,000.00, but would take the one, West Brooklyn,
232 claim or silica deposit, at $10,000.00.

Q. Is there anything else you want to add to that answer?

A. Well, under the same conditions, whenever the title was cleared, and that in the meanwhile we would only pay fifty cents less per ton for silica.

Q. And let the ownership of the Brooklyn mine rest in the Millers, as you understand it?

A. Well, when the title was cleared,—Miller then stated that he would take a (285) contract to quarry the silica at fifty cents a ton less and under those circumstances we proceeded. I told Mr. Job that we had numerous other silica propositions offered which we could mine at these reduced prices and desired him to endeavor to get this litigation settled up so we could decide on what we were to do.

Q. Up to that time you had not decided?

A. Not definitely decided, we were endeavoring to decide.

Q. The Millers wanted more than $10,000.00 for this claim?

A. No, sir.

Q. Are you sure of that, Mr. Clark?

A. I am sure of that because I had somehow learned the price stated in this other agreement, I had never seen it and did not see it stated until this year. I had learned that the price stated was $10,000.00, and I stated that figure.

Q. But they had not consented to it, had they, at that time?

A. I don't think they immediately consented to it because when this first proposition was made, I think it was only made to C. C. Miller, and we would have to hear from the others.

233 Q. That is Charles C. Miller?

A. Yes.

Q. Now, the understanding at that time, in these arrangements you were to pay the higher price for the silica and the Millers were to take care of the litigation, and the Millers were to see to it that the silica mine was not subject to the litigation, but that the title was to be cleared? (286.)

A. Yes, something of that sort is true, I have very often made the same statement, that we would not be concerned in the litigation.

Q. Mr. W. L. Clark is the President of your corporation?

A. W. A. Clark.

Q. You have been continuously taking silica from these people down to the present time, haven't you?

A. Yes, sir.

Q. Under the arrangement that you have testified to?

A. Under this reduced price.

Q. That came up when the panic struck us in December?

A. Yes, sir.

Q. It was a subsequent modification?

A. Yes.

Q. When the panic struck you, you stated that you would not pay the increased price because of the condition of the money market?

A. The necessity the management felt of getting the cost of production down. We have produced a large quantity of copper notwithstanding the expense.

Q. You received a deed by mail?

A. Yes, sir.

Q. Do you know when that deed reached you?
A. I think on the second.
Q. Have you any means of determining that, Mr. Clark?
A. I arrived here on the 2nd from the east, and I think the deed was here. (287.)
234 Q. You came back on the 2nd?
A. Yes.
Q. And found the deed on your desk?
A. Yes, sir.
Q. You did talk with Mr. Job concerning that, didn't you, on this date you referred to, about the 14th of March?
A. Possibly.
Q. In order to refresh your memory only on that point, didn't you state to Mr. Job that you returned to your place of business here on the 2nd and found upon your desk a deed from the widow of A. V. Miller and some of the others, Miller and Lasbury, perhaps, and you stated you did not understand why it was there and knew nothing of the reason for its presence, isn't that true?
A. I don't think I made that exact statement. I said I didn't know why the deed was sent there.
Q. Isn't this a fact,—I don't do this for impeachment—isn't it a fact that you at that time said that some time previously, and you thought before A. V. Miller's death, a deed had been executed and left at the office of Norris & Ross to be accepted by the United Verde Copper Company in case they ever did take over the ownership, and the second deed was forced upon the United Verde Copper Company, in the way mentioned and was not accepted nor recorded? I ask you (228) if that is not the fact in substance?
A. I don't know, there was only one deed.
Q. The only deed that you know of. Isn't it true that the facts were about these: That a deed was executed and left at the office of Norris & Ross, as you understood it, and that that was the
235 deed you found on your desk, and that you never accepted that deed and never recorded it?
A. Yes, I said to Mr. Job I had not accepted the deed.
Q. That is the fact, too, isn't it?
A. Yes.
Q. You never considered that you exercised this option so that you are bound to pay for this claim, have you, Mr. Clark?
A. Our attitude has been all the time precisely this: Whenever this litigation was ended and a clear abstract of title presented, we will take over the claim.
Q. No abstract has ever been tendered?
A. No.
Q. The Millers have never asked you to pay them $10,000.00 for this claim, have they?
A. O, yes.
Q. When did they ask you that, Mr. Clark
A. Sometime this spring, we considered this question.
Q. Subsequent to the 1st of January?
A. Yes.

Q. I mean prior to the 1st or 2nd of January this year?
A. No, prior to the 1st of January the transaction was left in the hands of the attorneys to close it if the suit was (289) dismissed.
Q. Mr. Clark, you did not consider, and you have never considered that your company has exercised this option so that the Millers could sue you and make you pay the $10,000.00 for that claim, or any of the purchase price, isn't that true?
A. I have never considered any such contingency. They have never demanded it.
Q. You do not consider today that the United Verde Copper Company owes the Millers $10,000.00 for this claim, do you?
A. No, sir.
236 Q. Let me ask you if this is not about the situation or condition, Mr. Clark. After you returned on the 2nd of January, it was then that you notified the Millers that you would pay the lower price for the silica, and up to that time you had been paying the higher price?
A. No, sir.
Q. You never had seen this contract of August 27 between the Millers and the Brooklyn Mining Company?
A. No, sir; the first knowledge I had of the contract, definite knowledge, was that which Mr. Job read from it here.
Q. That was the first time the terms of that contract were communicated to you by any person?
A. Yes.
Q. Now your purpose in advancing money to the Millers was that they might clear the title and then subsequently deal (290) with you on your option, isn't that true?
A. Not precisely, my idea was to get the title cleared and the proposition in such shape that we could get a lower priced silica. It wasn't to enable them to clear the title.
Q. You understood the Millers were raising money to quiet the title?
A. Yes, sir.
Q. You advanced the money to do that in that regard?
A. Yes, sir; but not solely for that purpose.
Q. Of course you are running a big plant and were interested in keeping the supply of silica good?
A. Yes, I had some fears about that, that this litigation might suddenly tie us up.
Q. You got an extension of your option once from the Millers, didn't you?
A. Yes, I think so.
237 Q. When was that extension obtained, in January?
A. We got several extensions.
Q. I mean the last one. In January, wasn't it?
A. I won't give the dates, the matter was in the hands of the attorneys.
Q. You remember the extension?
A. There were several (291) extensions.
Q. I mean the last one?
A. I think the extension was made when the other arrangements

were made, before the first of January. I don't recall it positively.

Q. You are not sure about that.

—. ——.

Redirect examination by Mr. Ross:

I have never been advised by my attorneys at any time that the title to the West Brooklyn claim was free and clear of litigation and in condition to be taken over as a marketable title. Prior to my conversation with Mr. Job, mentioned by counsel, my knowledge of the contract of August 27 simply went to the extent that I knew that Miller Brothers, under some agreement of settlement which had been made between them and their opponents in the litigation, were required to pay certain moneys within a certain time to settle litigation.

Recross-examination by Mr. HOWELL:

Q. You never intended to exercise this option until you did receive advice from your attorneys, did you, Mr. Clark?

A. Certainly. I would like to add that in this conversation with Mr. Job I told him frankly then the attitude of the com-
238 pany and especially the point that if this proposition was not settled we would look elsewhere for our silica and stop this business entirely. I supposed it was a confidential conversation. I didn't know he was going to inject it into this litigation. (292).

Examined further by Mr. Ross:

I returned the deed to the attorneys, Norris & Ross, with instructions not to commit us to pay the purchase price until this title was settled, and otherwise not to record it unless it was to protect the amount we had advanced. (295).

PLAINTIFF'S EXHIBIT "M" 1.

Shorthand notes by Charles W. Pearsall. (In the Reporter's Transcript this is marked Exhibit "M," but in this Abstract it is designated as Exhibit "M" 1 to avoid confusion with Plaintiff's Exhibit "M" which is the deposition of Will L. Clark.)

PLAINTIFF'S EXHIBIT "N."

Transcript of Plaintiff's Exhibit "M" 1.

"DEWEY, ARIZONA, *Jan.* 27, 1907.

Your last letter received and contents noted. Things here re-
main about the same and we are still delivering quartz out
239 of the White Rock to United Verde. Humboldt has not taken any for about six weeks. Another firm is trying to get out rock for the Humboldt, but this is going to be short-lived. We have been staggering along to keep up the United Verde sup-

ply at a considerable loss to us. So you can get some idea of this loss we are to-day fifteen hundred dollars overdrawn at the bank and owe fully one thousand dollars more for labor, powder, etc. We are just simply keeping up supply to Verde until option expires. The option, as you know, has only thirty days more to run. Have a talk with Pearsall on receipt of this letter and tell him United Verde Copper Company has an option on five claims three miles south of Prescott with immense ledges of silica on all of them. At present they are making a tunnel through the ledges to find the extent of it. They are working night and day on them. The five claims are bonded to the United Verde for five thousand for about ninety days. It is their intention if they can't pull the deal off with us to take those claims. (The claims are about one mile from railroad with plenty of descent from ledges to railroad to build a tramway). If they take those claims and build a tramway, then they will be able to load silica for themselves and Humboldt for all time to come. Humboldt and the United Verde are the only concerns around here to take the product and if we
240 lose this trade Mr. Pearsall ought to see that it will make this property worthless forever. On the other hand, if United Verde should take this property it would make the Brooklyn property worth more. In fact the stock would be worth at least one dollar per share. Now, we have only got over fifteen days more to adjust this matter one way or the other. The Brooklyn Mining Company at the end of this time will either be a rich property or worthless. Suggest to Pearsall, if he doesn't pull in his horns the sale can't go through; that Mr. C. C. Miller will put an attachment on the Brooklyn Mining Company's property for labor and services rendered for between five and six thousand dollars. He will not have any trouble to make it stick as he has advice of the best lawyers in the territory. This will, of course, tend to make matters more complicated and the Brooklyn Mining stock or property more worthless, only resulting in a long mix-up which will probably not terminate for years to come. Lon and Charlie want to quit this taking out silica. It is a whole lot of hard work and no pay, but as long as there is a chance to pull off a deal and get United Verde to develop mine next to Brooklyn we are willing to make almost any sacrifice and keep on working two or three weeks longer. Then we want to quit. When we once stop the deal with United Verde is off for ever and West Brooklyn will
241 not be worth doing assessment work on. Will it be any use for Lon or Charlie to come to Omaha? We don't want to make the trip unless Pearsall can't see what is the best interests for the Brooklyn Mining Company. Tell Mr. Pearsall that as soon as we were served with notice of complaint on the first of January, we at once tore up all the track on the West Brooklyn and stopped work there. We can, of course, keep on taking product out of White Rock indefinitely. We are not making anything, in fact operating at a loss. Therefore, we want to quit work as soon as possible. The only reason we got United Verde contract at first was by underbidding everybody else, figuring that after using the

product they would be more eager to buy the property. The only object of doing all this work and making sale was to get United Verde next to Brooklyn mining property. We figured that after they had used our quartz a few months and found it O. K. they would not be so ready to throw it up for some other property that they hadn't tried. That is, we thought they would give our property the preference. Mr. C. C. Miller was over to Jerome and had a long talk with Mr. McDermott, mining engineer for United Verde, and he says the copper company will close the deal at the expiration of the option and give us the money provided there is no legal technicalities such as Pearsall's law suit. He says the question of title has already been passed on and pronounced
242 perfect. Lon was in Prescott yesterday and got back this morning. There was no Brooklyn Mining Co. meeting. It was postponed indefinitely. If Mr. Pearsall should suggest leaving any settlement that might be made to his lawyers then we might as well call this deal off, because they are a couple of important, swell-headed pettifoggers and wouldn't settle matters if they could and his lawyers don't want to settle under any consideration as they think Pearsall a wealthy man and they expect big fees from him. Now, if Pearsall is working for the very best interests of the Brooklyn Mining Co. he will dismiss this suit at once and unless he does dismiss it, tell him to watch matters and see how utterly worthless it is going to become.

Very truly yours,

(Signed) A. V. MILLER.
(Signed) C. C. MILLER."

(See pages 255 to 258 of Reporter's Transcript.)

PLAINTIFF'S EXHIBIT "O."

"This Agreement, made the 4th day of September, 1906, between A. V. Miller of Omaha, Nebraska, and C. C. Miller of Dewey, Arizona, first parties, and United Verde Copper Company, a corporation doing business in Jerome, Yavapai County, Arizona, second party.

243 Witnesseth: That for and in consideration of one ($1.00) dollar lawful money of the United States and other good and valuable considerations, paid by second party to first party, receipt whereof is hereby acknowledged, the first parties have granted and do hereby give and grant unto second party the exclusive right and option to purchase two certain quartz mining claims located in Big Bug Mining District, Yavapai County, Arizona, about one-half mile in a westerly direction from Dewey, a rail road station on the Prescott & Eastern Railway (erasure) more particularly described as follows, to-wit: the West Brooklyn Mining Claim, notice of location whereof is recorded in Book 67 of Mines, page 408, and the White Rock Mining Claim, Notice of Location whereof is recorded in Book 76 of Mines, page 223, locations having been made respectively April twentieth, 1903, and June eighth, 1906.

Said option is hereby made for the period of four months next from and after the date hereof, and at any time during said four months or at the expiration thereof second party has a right to purchase the property for Twenty Thousand Dollars ($20,000.00). In order to facilitate the execution of this agreement, it is hereby stipulated that the first parties shall make and execute a good and sufficient deed transferring the title to second party, which title shall first be approved by counsel for second party and the deed
244 together with this agreement shall be placed in the hands — Thos. G. Norris, escrow agent for the parties, and upon the payment of the purchase price by second party, said deed and agreement shall be delivered by said agent to the second party for record. Upon failure to make payment as herein provided said agent is hereby required to return this agreement together with the deed to the first party.

It is mutually understood and agreed that first party- shall have the right during the life of this agreement to mine and sell the quartz from the property to whom they may wish, provided that first parties hereby agree and bind themselves to furnish to second party from said claims the best quality of quartz, clean and free from waste, in such quantities as may be desired by second party, for and in consideration of the sum of Two Dollars ($2.00) per ton f. o. b. the cars at Dewey Station, and if a spur or track is built to the property relieving the necessity of wagon haul then to furnish such quartz in quantities required f. o. b. cars at price of One Dollar ($1.00) per ton. Second party, during the life of this agreement shall have the right to enter upon the property and make such examination thereof as it may desire for the purpose of determining whether it will purchase under this agreement. This agreement shall be binding upon the heirs and adminis-
245 trators of first parties and the successors and assigns of second party.

In Witness Whereof, the first parties have hereunto set their hand and seal and the second party has caused the same to be signed by its proper officer, this 4th day of September, 1906.

UNITED VERDE COPPER CO.,
By CHAS. W. CLARK, *Gen'l M'g'r.*
C. C. MILLER.
A. V. MILLER.

Acknowledged by first parties.
(See pages 259 and 260 of Reporter's Transcript.)

PLAINTIFF'S EXHIBIT "P."

"Affidavit of Labor Performed and Improvements Made.

TERRITORY OF ARIZONA,
County of Yavapai, ss:

C. C. Miller, being duly sworn, deposes and says that he is a citizen of the United States and more than twenty-one years of age, and resides at Dewey, in Yavapai County, Arizona Territory, and

is personally acquainted with the mining claims known as Empress, Midway and North Brooklyn mining claims situate in Big Bug Mining District, County of Yavapai, Arizona Territory, the location notice of which is recorded in the office of the County Recorder of said county, in Book 67 of Records of Mines,
246 at page 265-266-267; that between the 1st day of January 1907, and the 1st day of April, A. D. 1907, at least 150 dollars' worth of work and improvements were done and performed upon said claims, not including the location work of said claims, such work and improvements were made by and at the expense of C. C. Miller—A. V. Miller—owners of said claims, for the purpose of complying with the law of the United States pertaining to assessment of annual work, and John Polanis—were the men employed by said owners and who labored upon said claim, did said work and improvements, the same being as follows, to-wit:—one shaft 4 ft. by 6 ft. & 10 ft. deep on each claim.

C. C. MILLER.

Subscribed and sworn to before me this 19th day of December, A. D. 1907.

[SEAL.] T. G. NORRIS,
Notary Public.

(My commission expires Mch. 26, 1910.)

(Endorsed:) Filed and recorded at request of Norris & Ross, Dec. 20, A. D. 1907, at 10:10 o'clock A. M. Book 18 Promiscuous, page 89, Records of Yavapai County, Arizona."

(See pages 262 and 263 of Reporter's Transcript.)

247 PLAINTIFF'S EXHIBIT "Q."

"Affidavit of Labor Performed and Improvements Made.

TERRITORY OF ARIZONA,
County of Yavapai, ss:

C. C. Miller, being duly sworn, deposes and says that he is a citizen of the United States and more than twenty-one years of age, and resides at Dewey in Yavapai County, Arizona Territory, and is personally acquainted with the mining claims known as East Brooklyn, South Brooklyn & West Brooklyn mining claims situate in Big Bug Mining District, County of Yavapai, Arizona Territory, the location notice of which is recorded in the office of the County Recorder of said County, in Book 67 of Records of Mines, at page 406-407-408; that between the 1st day of January A. D. 1907, and the 1st day of December A. D. 1907, at least 2000 dollars' worth of work and improvements were done and performed upon said claims, not including the location work of said claim. Such work and improvements were made by and at the expense of

C. C. Miller—A. V. Miller—owners of said claim, for the purpose of complying with the law of the United States pertaining to assessment of annual work, and—H. Minuse, T. Contreras, D. Hutchinson, A. Contreras, C. W. Stevens, T. Caranza were the men employed by the said owners and who labored upon said claim,
248 did said work and improvements, the same being as follows, to-wit:—Open cut 200 ft. long 40 feet High—all work done on West Brooklyn for the benefit of the entire group consisting of the West Brooklyn, South Brooklyn and East Brooklyn.

C. C. MILLER.

Subscribed and sworn to before me this 19th day of December A. D. 1907.

[SEAL.] T. G. NORRIS,
Notary Public.

(My commission expires M'ch 26, 1910.)

(Endorsed:) Filed and recorded at request of Norris & Ross, Dec. 20, A. D. 1907, at 10:10 o'clock A. M. Book 18 Promiscuous, Page 88 Records of Yavapai County, Arizona."

(See pages 264 and 265 of Reporter's Transcript).

PLAINTIFF'S EXHIBIT "R."

Mining deed dated October 4, 1907, from C. C. Miller, A. V. Miller and George B. Lasbury, of the first part, to Brooklyn Mining & Milling Company, of the second part, conveying South Brooklyn, East Brooklyn, Midway, Empress, and North Brooklyn mining claims, containing the following guaranty: "And said parties of the first part do hereby covenant, agree and warrant that the annual assessment work has been done upon said Empress and Mid-
way claims for the year 1907." Acknowledged October 10,
249 1907, by C. C. Miller and A. V. Miller in Yavapai County, Arizona, and on October 22, 1907, by George B. Lasbury in Douglas County, Nebraska. Not endorsed or recorded. (See pages 266 to 268 of Reporter's Transcript).

PLAINTIFF'S EXHIBIT "S."

Mining deed dated September 4, 1906, from A. V. Miller and C. C. Miller, of the first part, and United Verde Copper Company of the second part, conveying the West Brooklyn and White Rock mining claims. Acknowledged in Yavapai County, Arizona, by the grantors on September 4, 1906. Not endorsed or recorded. (See pages 269 to 271 of Reporter's Transcript.)

PLAINTIFF'S EXHIBIT "T."

Mining deed dated December 17, 1907, from A. V. Miller, of the first part, to Ada M. Miller, of the second part, conveying the

West Brooklyn and White Rock mining claims. Acknowledged in Yavapai County, Arizona, December 18, 1907. Not endorsed or recorded. (See pages 272 and 273 of Reporter's Transcript).

DEFENDANTS' EXHIBIT "1."

Compromise offer dated February 9, 1907, signed by Chas. W. Pearsall for Brooklyn Mining Co. (See folios 390 to 393
250 of this Abstract of Record, and page 274 of Reporter's Transcript).

DEFENDANTS' EXHIBIT "2."

Same as Plaintiff's Exhibit "D," and identical with contract set out in Plaintiff's complaint. (See folios 9 to 18 of this Abstract, and pages 275 to 277 of Reporter's Transcript).

DEFENDANTS' EXHIBIT "3."

Deposition of Will L. Clark, a witness on behalf of defendant, taken at Yavapai County, Arizona, in the case in the District Court of Douglas County, Nebraska, between the parties to this action, identical with Plaintiff's Exhibit "M." (See folios 676 to 713 of this abstract of Record, and pages 278 to 292, and page 295 of Reporter's Transcript).

DEFENDANTS' EXHIBIT "4."

"This agreement made and entered into the 21st day of April, A. D. 1905, between Brooklyn Mining and Milling Company of Big Bug Mining District, Yavapai County, Arizona, witnesseth; that Whereas the said Brooklyn Mining and Milling Company is the owner of a certain mine, and is the locator of certain other mining claims adjacent thereto, a ten stamp mill with two plates, all
251 set up and in working order, a forty horse-power boiler and engine, 2 ore buckets, 500 feet of 7/8 inch wire cable, 1 whim, 1 pump properly set up and connected for raising water from the shaft of said mine, and other machinery tools and property necessary for work in and about the mining property, at and near Cherry Creek Station, Yavapai county, Arizona; which said property is free and clear of all debts and encumbrances excepting taxes in the sum of about sixty-eight (38) dollars, and there being no debts against said company, and

Whereas said Brooklyn Mining and Milling Company is desirous of developing said mine and operating said machinery, and putting said mine on a paying basis and making same profitable to the stockholders of said company,

Therefore, in Consideration of the payment of the sum of five hundred (500) dollars by Charles W. Pearsall to the said Brooklyn Mining and Milling Company, the receipt of which is hereby acknowledged, the said company agrees to and does sell and transfer

to the said Charles W. Pearsall seven thousand five hundred (7,500) shares of treasury stock of the said company, and the said Charles W. Pearsall is to have the option of purchasing the remaining treasury stock amounting to seven thousand five hundred (7,500)
shares, and is to pay therefor the further lump sum of
252 five hundred (500) dollars, which said option shall terminate on the 1st day of August, A. D. 1905.

It is Further Agreed by and between the parties hereto that the said company is to use its best endeavor to obtain the stock of said company, now owned and in the possession of one T. H. Hulbert of Chicago, Illinois, aggregating about one hundred thousand (100,000) shares, at a price not to exceed two (2) cents per share, and in the event that said stock is so secured it is to be divided at such price between George B. Lasbury, C. C. Miller, A. V. Miller, T. H. Ensor and Charles W. Pearsall in such proportions so that the stock so distributed to each, together with the then holdings of each, shall be in equal amounts, and so that the holdings of no one of the above mentioned shall exceed that of any other.

It is Further Agreed that if the said Pearsall after an examination of the above named property and before August 1, A. D. 1905, shall desire to return to said Company the treasury stock, so purchased as above set forth he may do so, and shall receive therefor from said company the sum of five hundred (500) dollars, the amount so paid by said Pearsall for said stock.

It is Further Agreed and made of the essence of this contract that the said sum of five hundred (500) dollars, so paid by said Pearsall for said treasury stock is to be economically used in and about the
above mentioned mine and property in operating, improving
253 and developing same.

In Witness Whereof we have hereunto set our hands this 21st day of April, A. D. 1905.

[CORPORATE SEAL.]

BROOKLYN MINING & MILLING CO.
A. V. MILLER, *President.*

Attest:
CHAS. W. PEARSALL,
G. B. LASBURY, *Secty.*"

(See pages 296 and 297 of Reporter's Transcript).

DEFENDANTS' EXHIBIT —.

Deposition of John M. Ross, Taken at Yavapai County, Arizona, in the Case in the District Court of Douglas County, Nebraska, Between the Parties to This Action.

"My name is John M. Ross. I am now and during the last two years have been a member of the firm of Norris & Ross, heretofore mentioned in these proceedings. During the month of December, 1907, after the death of A. V. Miller, I called Mr. Job over the

telephone and discussed with him the death of A. V. Miller, and he came to our offices and he and I had an extensive conversation of probably an hour concerning the effect which the death of A. V. Miller might have in closing up the contract of August 27th, 1907, on or before the 2nd day of January, 1908. I showed
254 Mr. Job the deed from the Millers and Lasbury which had been drawn by him and told him that I would assure him, between ourselves, that I would secure any quit-claims from the widow and heirs of A. V. Miller so as to remove any possible question as to the validity of the title transferred to the Brooklyn Mining & Milling Company. I told him to do this would require delay beyond the second day of January, 1908, owing to the fact that one of the sons of A. V. Miller was somewhere in Chinese waters in the United States Navy. Mr. Job assured me it would be entirely satisfactory to him to have the matter fixed up in that way and that no objections would be made to the title on that ground. It being understood that it should be perfected in the manner that I have mentioned. During the month of December, 1907, and I think during the latter part of the month, I was in the District Court at Prescott; Mr. Job was there and we called up the pending case of Brooklyn Mining & Milling Company vs. Miller, et al., that being one of the cases mentioned in the agreement of August 27th, and also the case of Miller vs. Brooklyn Mining & Milling Company, that case being also mentioned in that agreement and asked that the first case mentioned be dismissed as required by the terms of the agreement of August 27th; and at that time I offered to, and as I understood it, did dismiss our case. At least I instructed the Clerk to enter our dismissal. Mr. Job stated that he did not
255 understand that the agreement required the dismissal of the first case mentioned and declined to dismiss it. (See pages 293 and 294 of Reporter's Abstract).

Stipulation.

[Title of Court and Cause.]

"Plaintiff having heretofore filed with the Clerk of the above entitled court the reporter's transcript of the proceedings and oral testimony in said cause, and the defendants having filed certain exceptions to said transcript and having suggested certain amendments thereto, it is stipulated between plaintiff and defendants for the purpose of setting the amendments to said transcript, as follows:

That said transcript may be and is hereby amended so as to show that said action was regularly set for trial on December 23, 1908; that on the 22nd of December, 1908, plaintiff's motion for continuance theretofore filed came on to be heard; that said motion was opposed by defendants; that counsel for plaintiff thereupon stated in effect that they would agree, if this cause were continued, that no judgment which might be secured in the District Court of Douglas County, Nebraska, in an action then pending between the same parties, should be pleaded in this action, whereupon
256 the following colloquy took place:

By Mr. Norris: It is stipulated that no judgment in the

Omaha court will be pleaded in this court, and it is admitted that it can have no effect on the trial of the proceedings in this court.

By Mr. Job: That is going beyond my province as to what effect it will have.

By Mr. Norris: I assert it, and our correspondence clearly shows that.

By Mr. Ross: That is sufficient, that it will not be pleaded.

By the Court: Yes, if it is not pleaded it will not amount to anything.

That said motion was thereupon granted by the Court and said cause continued.

It is further stipulated that the exceptions to the reporter's transcript heretofore filed by defendants may be withdrawn from the files.

(Signed) JNO. J. HAWKINS,
THOMAS C. JOB,
Attorneys for Plaintiff.
NORRIS & ROSS,
Attorneys for Defendants."

257 *Judge's Certificate.*

The foregoing Reporter's Transcript and amendments thereto having been presented to me on this 26th day of September, 1909, by the Clerk of said Court, I certify that the same is correct and the same is made a part of the record of said cause, and contains all of the evidence in said cause, together with all of the rulings, orders and other actions of the court taken at the trial of said cause which do not otherwise appear of record, and the same is settled, allowed and approved as a statement of facts of said cause.

RICHARD E. SLOAN,
Judge Who Tried Said Cause.

Sept. 26th, 1909.

Appeal Bond.

Dated May 11, 1909, and approved and filed May 14, 1909.

Clerk's certificate.

258 And on to-wit: the tenth day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. Reese M. Ling for appellees, it is ordered by the Court that oral argument be granted in this cause, and the hearing set for January 24, 1910.

It is further ordered that appellant herein be granted until the 24th of January within which to file reply brief.

And on to-wit: the twenty fourth day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day on motion of Mr. Jno. J. Hawkins, attorney for appellant herein, it is ordered by the Court that Mr. Frank S. Howell be admitted for the purpose of argument in this cause on behalf of appellant.

259 And on the same day to-wit: the twenty-fourth day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

This cause coming on at this time for hearing, was argued by Mr. Frank S. Howell and Mr. Thos. C. Job for appellant, and Mr. J. M. Ross and Mr. Reese M. Ling for appellees, and cause ordered submitted.

And on to-wit: the second day of April, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Opinion in words and figures following, to-wit:

260 In the Supreme Court of the Territory of Arizona.

No. 1135.

BROOKLYN MINING & MILLING COMPANY, a Corporation, Appellant,

vs.

CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER No. 2, and GEORGE MILLER, Appellees.

Appeal from the District Court of Yavapai County, Before Hon. Richard E. Sloan, Judge.

John J. Hawkins, Thomas C. Job and Frank S. Howell, for appellants.

Norris & Ross and R. M. Ling for appellees.

Opinion by DOAN, *J.*:

This was an action brought in February, 1908, by the appellant against the appellees herein in the District Court of Yavapai County

for the specific performance of a contract made between the several parties on August 27th, 1907. The case was tried to the Court in March, 1909, and on April 24th, 1909, the judgment was rendered against the plaintiff, from which this appeal is taken.

The record is voluminous. The facts in the case are as follows: Prior to December, 1906, the Brooklyn Mining and Milling Company, a corporation, was the owner of the Brooklyn mining claim in Yavapai County, Arizona. Charles W. Pearsall was then
261 and at all times since has been president of that corporation, and a stockholder therein. Alonzo V. Miller, George V Lasbury and Charles C. Miller were also stockholders in said company, and prior to December, 1906, had located in their own name, together with one Thomas H. Ensor as co-locator three mining claims adjoining the Brooklyn claim, known as the West Brooklyn, the East Brooklyn and the South Brooklyn claims. In August, 1906, Lasbury acquired Ensor's interest in the three claims by deed recorded September 18th, 1906, after which date Alonzo V. Miller, George V. Lasbury and Charles C. Miller were the record owners of said claims. In September, 1906, Miller and Lasbury gave an option to the United Verde Copper Company for the purchase of the West Brooklyn claim and the White Rock claim (which does not figure in this suit), for the sum of twenty thousand dollars. The term of this option does not definitely appear, but it was extended at different times and kept in force up to January 1st, 1908.

In December, 1906, Pearsall, in behalf of himself and other stockholders instituted a suit (No. 4541) in the District Court of Yavapai County against the Millers and Lasbury for the purpose of having it declared that the Millers and Lasbury held the title to the West, East and South Brooklyn claims in trust for the Brooklyn Company, and to require them to convey said claims to the company. An amended complaint was filed on July 7th, 1907, in this action naming the Brooklyn Mining Company as plaintiff.
262 In May, 1907, Charles C. Miller brought suit against the Brooklyn Company for five thousand dollars claimed to be due him for work done upon the Brooklyn claim. While both suits were yet pending a compromise agreement was made between the parties on August 27th, 1907, as follows:

"Whereas, an action is now pending in the District Court of Yavapai County, Arizona, entitled Brooklyn Mining & Milling Company et al. vs. Charles C. Miller, Alonzo V. Miller and George B. Lasbury, which action relates to the title of the West Brooklyn, East Brooklyn and South Brooklyn Mining claims located in said county and territory, and relates to an accounting for ores and minerals taken therefrom, and

"Whereas, The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury have made a conditional sale of the above named West Brooklyn Mining Claim for the sum of ten thousand dollars to the United Verde Copper Company, and

"Whereas, an action is pending in the District Court of Yavapai County, Arizona, entitled Charles C. Miller v. Brooklyn Mining &

Milling Company for several thousand dollars claimed to be due and owing to the said Charles C. Miller for services performed by him and Alonzo V. Miller for the said Brooklyn Mining & Milling Company, and

"Whereas, It is the desire of the parties connected with the foregoing causes of action to settle the same, and to adjust the matters of difference between the parties in connection therewith:

"Therefore, In consideration of the dismissal and settlement of the foregoing causes of action it is hereby stipulated and agreed by and between the Brooklyn Mining & Milling Company and Charles C. Miller, Alonzo V. Miller and George B. Lasbury that if the sale of the West Brooklyn Mining claim to the United Verde Copper Company is consummated on or before the first day of January, 1908, the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to transfer and deliver to the said Brooklyn Mining & Milling Company one hundred and seventy-five thousand shares (175,000) of stock in said Brooklyn Mining & Milling Company, free and clear of all liens and incumbrances whatsoever; it
263 being understood that said transfer of stock is to include all of the holdings of the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury in the Brooklyn Mining & Milling Company, and the said parties are to receive therefor the sum of 3 (Three) cents per share for said stock; and in addition thereto Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to pay to the Brooklyn Mining & Milling Company the sum of eight thousand five hundred dollars ($8,500.00) out of the proceeds derived from the sale of the said West Brooklyn mining claim; in addition thereto the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey all of their right, title and interest in and to the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and said transfer shall contain the warranty that the assessment work has been done for the year 1907 upon the Empress, Midway and North Brooklyn, and the said Brooklyn Mining & Milling Company shall pay the said assessment work at its reasonable value. The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury agree to do the assessment work for the year 1907, on the East and South Brooklyn mining claims, and said assessment work so to be performed is to be paid for by the Brooklyn Mining & Milling Company at its reasonable value. It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury shall not be consummated on or before the first day of January, 1908, then the said Charles C. Miller, Alonzo B. Miller and George B. Lasbury are to convey to the Brooklyn Mining & Milling Company all of their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value.

It is understood by and between the parties hereto that the foregoing does not concede or admit any of the allegations contained in the pleadings of said causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties and avoiding further costs and expenses to the parties hereto.

In witness whereof, We have hereunto set our hands this
264 27th day of August, A. D. 1907.

C. C. MILLER,
A. V. MILLER,
G. B. LASBURY,
BROOKLYN MINING & MILLING COMPANY,
By CHAS. W. PEARSALL, *President.*"

On December 17th, 1907, Alonzo V. Miller executed, acknowledged and delivered to Ada M. Miller a deed, conveying to her his interest in the West Brooklyn claim. On December 18th, 1907 Alonzo V. Miller died, leaving a widow, Ada M. Miller, and two sons, viz: Charles C. Miller No. 2, and George M. Miller, a minor.

In December, 1907, counsel for Lasbury and the Millers requested a dismissal of action No. 4541 and directed a dismissal of No. 4608 (the case of Miller v. the Company) Counsel for the company declined to dismiss the case against the Millers, and the formal dismissal of the Miller case was not entered of record until January 2nd, 1908.

On January 2nd, 1908, the case of Miller against the Brooklyn Company, No. 4608, was dismissed. Consummation of the sale of the West Brooklyn to the United Verde Company was claimed, and a tender of performance of the obligation of the Millers and Lasbury, under the agreement of August 27th, 1907, was made. This tender was refused by counsel for the appellant on the ground that it did not fully comply with the terms of the agreement, and counsel again decline to dismiss the suit, No. 4541.

On January 28th, 1908, the Brooklyn Company brought suit in the District Court of Douglas County, Nebraska, against
265 Charles C. Miller, George B. Lasbury and the survivors of Alonzo V. Miller, viz: Ada M. Miller, Charles C. Miller No. 2 and George M. Miller, a minor, for the specific performance of the agreement of August 27th, 1907, and George B. Lasbury and Ada M. Miller were personally served with process in Nebraska.

On February 15th, 1908, the Brooklyn Company dismissed action No. 4541 involving the title to the West Brooklyn claim, being the action, the dismissal of which was stipulated in the agreement of August 27th, 1907, and on the same date, immediately thereafter, filed another action, No. 4923 of the same general character. On February 18th at 9 o'clock A. M. the Brooklyn Company dismissed action No. 4923, and on that date at 9:10 A. M. filed the case at bar, No. 4927.

The actions numbered 4541, in which a lis pendens was filed,

4923 and 4927, and the suit brought in Nebraska on January 28th, 1908, all involved the title to the West Brooklyn claim.

On December 23rd, 1908, the case at bar came on for trial in Yavapai County, and the plaintiff asked for a continuance. This was contested by the defendants and, the pendency of the action in Nebraska urged by them as ground for a trial at that time. It was then stipulated that if the case was continued—no judgment which might be secured in Douglas County, Nebraska, should be
266 pleaded in this action. Thereupon the continuance was granted on the motion and at the cost of the Brooklyn Mining & Milling Company, plaintiff.

The Nebraska case was tried on February 8th, 1909, and decided in favor of the company. The Nebraska court held that the sale of the West Brooklyn had not been consummated as provided for in the agreement of August 27th, and decreed that Charles C. Miller and Ada M. Miller specifically perform the obligations devolving upon them under the compromise agreement by reason of the non-consummation of the said sale, and decreed that Charles C. Miller and Ada Miller convey to the Brooklyn Company the West Brooklyn claim, and the five other claims named in the compromise agreement, and in default of their so doing a master be appointed by the court to make such conveyance. No Parties to the Nebraska suit were served with process or appeared except Ada M. Miller and Lasbury. The master appointed by the court thereafter executed and delivered a conveyance of the claims mentioned to the Brooklyn Company.

On March 25th, 1909, the case at bar came on for trial in the district court of Yavapai County, and on April 24th, judgment was rendered therein. Immediately prior to the trial of the case, the plaintiff filed a reply to the amended answer and cross complaint, in which reply it pleaded the judgment and decree of the Nebraska court, and the conveyance by the commissioner thereunder.
267 In a written decision filed on April 24th, the court found that the sale of the West Brooklyn to the United Verde by the defendants, had not in fact been consummated on or before January 1st, 1908, but that the failure to consummate such sale was caused by the failure and refusal of the plaintiff to dismiss the action (No. 4541) brought by the plaintiff against the defendants in December 1906, which involved the title to the West Brooklyn claim, and the dismissal of which was made obligatory upon the plaintiff by the terms of the agreement. The court found from the record that this suit was not dismissed until February 15th, 1908, and that another similar suit was brought by the plaintiff before an opportunity was afforded the defendants to consummate said sale. That the defendants, prior to January 1st, 1908, endeavored to effect the sale to the United Verde, and that the pending litigation prevented such sale; that the United Verde had ever since been willing to make the purchase at the price of ten thousand dollars if pending litigation was dismissed, and a clear title could thereby be given them. The court then held that the plaintiff was not then in a position to enforce specific performance on the part of the defendants for the reason that

it was itself at fault in not dismissing the litigation; thus removing the obstacle to the negotiation and consummation of the sale. The court further held that as all the parties were before the court, and the agreement was regarded by the parties as still in force,
268 that he would not dismiss the action, but would grant to the defendants reasonable time to consummate the sale under the terms of the agreement. The judgment of the court therefore was that an interlocutory order and decree be entered, giving the defendant ninety days from that date to make the sale and comply with the other terms of the agreement. Thereupon the court caused an interlocutory decree to be entered as follows:

"This cause came on regularly to be heard on the 25th day of March, 1909, plaintiff appearing by John J. Hawkins and T. C. Job, Esqs., its attorneys, and F. S. Howell of counsel, and defendants, Charles C. Miller, Ada M. Miller, Charles C. Miller No. 2, and George Miller, a minor by Charles C. Miller No. 2, his guardian ad litem, appearing by Reese M. Ling, Esq., and Messrs. Norris & Ross, their attorneys.

"A jury being expressly waived by both parties, the cause was tried to the court upon plaintiff's amended and supplemental complaint, the amended answer and cross-complaint of defendants Charles C. Miller, Ada M. Miller, Charles C. Miller No. 2 and Charles C. Miller No. 2 as guardian ad litem of George Miller, a minor, and plaintiff's reply to said amended answer and cross-complaint, together with said defendants' motion to strike and replication addressed to said reply. Evidence both oral and documentary was introduced on behalf of the respective parties, and the parties rested, and the cause was submitted to the court for its decision and judgment. Thereafter it was argued to the court by counsel of the respective parties through written briefs.

"The court having considered the evidence in said cause, the argument of counsel, and the principles of law and equity applicable thereto, and being fully advised in the premises, on the 24th day of April, 1909, made and filed its written decision herein, and orders that a judgment and decree be entered in accordance therewith.

"Now therefore, for the purpose of giving defendants an opportunity to consummate the sale of the "West Brooklyn" mining claim to the United Verde Copper Company, or make a binding contract for such sale free and clear of all claims and litigations on the
269 part of plaintiff touching or questioning said title, and in accordance with said written decision and for the purpose of fully determining the rights of the parties hereto under the contract sued upon an alternative decree is hereby made and entered herein as follows, to-wit:

(1) That within thirty (30) days from the date hereof plaintiff shall file herein its written consent that this decree conditional upon a sale of the "West Brooklyn" mining claim to the United Verde Copper Company as hereinafter provided shall become final, irrevocable and non-appealable, and consenting that said defendants within the time hereinafter stated may make a sale or a binding

contract therefor of the "West Brooklyn" mining claim to the United Verde Copper Company free and clear of all claims and litigations on the part of plaintiff questioning or effecting the title to said claim.

(2) That if plaintiff shall fail, or refuse to file herein within said period of thirty days from the date hereof its written consent and waiver as provided herein, then and in such event plaintiff's action herein shall stand dismissed as of this date, and plaintiff shall take nothing thereby.

(3) Ordered, adjudged and decreed that if within ninety days from the date hereof said defendants shall consummate or make a binding contract for the sale of "West Brooklyn" mining claim to the United Verde Copper Company, and shall deliver and pay over or tender to plaintiff herein the money, stocks, deed and proof of assessment work which is provided by the contract of August 27th, 1907 shall be paid over and delivered by defendants to plaintiff, then and thereupon this decree shall forthwith become final, irrevocable and non-appealable as of this date, and plaintiff shall be forever barred and estopped from claiming any right, title or interest in or to said "West Brooklyn" mining claim.

(4) Ordered, adjudged and decreed that if plaintiff within the period aforesaid shall file its said written consent and waiver as above provided, and defendants shall fail to make such sale or binding contract therefor to the United Verde Copper Company, and to pay over and deliver or tender the money, stocks, deed and proof of assessment work aforesaid within the said period of ninety days, then and thereupon defendants shall forthwith execute and deliver to plaintiff a valid and sufficient deed conveying to plaintiff all their right, title and interest in and to the "West Brooklyn" mining claim as mentioned and provided in said agreement of August 27th, 1907,
270 and said agreement shall be fully carried out by all the parties hereto.

(5) Ordered, adjudged and decreed that plaintiff is not entitled to have or recover anything herein under, by virtue or by reason of that certain decree described in plaintiff's reply to defendants' cross-complaint herein rendered by the District Court of Douglas County, State of Nebraska, that the commissioner's deed made under and pursuant to said decree is void and of no force or effect, and that said deed does not constitute a cloud upon the title of the "West Brooklyn" mining claim.

(6) Ordered, adjudged and decreed that plaintiff is not in any event entitled to an accounting herein, or to have or recover in this action on account of silica heretofore sold or shipped by defendants or any of them from the "West Brooklyn" mining claim, and defendants shall have and recover from plaintiff their costs herein taxed at $37.35.

Done in open court this 24th day of April, 1909.

RICHARD E. SLOAN, *Judge.*"

The plaintiff failed and refused to file within thirty days thereafter its consent as provided in paragraphs 1, 3 and 4 of the alternative decree. The failure and refusal of plaintiff to file its consent as

provided for in the decree, renders the decree as set forth in paragraphs 1, 3, 4, 5 and 6 inoperative, and leaves as a final and substantive decree of the court only paragraph 2 dismissing the plaintiff's action, which would naturally carry with it the costs in the case.

The denial of an accounting in paragraph 6 was inadvertently ordered, for the dismissal without prejudice on March 26th of that part of the complaint which called for an accounting would prevent the court from an adjudication of that question in this case.

271 In presenting its appeal, appellant presents some 26 assignments of error. Assignments 1, 2, 3, 4, 5, 10, 11, and 12 are grouped together by the appellant, and may be so considered by us, and are to the effect that the decree of the court is not supported by sufficient evidence, but is contrary to law, equity and the uncontroverted evidence under the issues as presented and joined. Appellant argues in support of this contention that it was entitled to a decree for specific performance compelling defendants to convey to it the West Brooklyn and the other five claims, by reason of their failure to consummate prior to January 1st, 1908, the sale of the West Brooklyn to the United Verde, and make the stipulated tender of money and stocks that should follow said sale. It is conceded that the sale of the West Brooklyn to the United Verde was not consummated prior to January 1st, 1908. It is likewise conceded that the action No. 4541 entitled the Brooklyn Mining & Milling Company vs. Charles C. Miller, Alonzo V. Miller and George B. Lasbury, which related to the title of the West Brooklyn was not dismissed prior to January 1st, 1908. The appellant urges that no dismissal of this suit was required in any event by reason of the defendants' failure to carry out their agreement.

We cannot agree with this contention. The trial court found, and we think properly, that the failure by appellant to dis-

272 miss the action indicated in the contract, prevented appellees from consummating a sale to the United Verde Company within the period allowed them by the contract. Certainly it would be inequitable to permit appellant so to take advantage of its own wrong. Therefore, upon the state of facts existing at the time of trial, appellant was not entitled to specific performance. But the trial court conceiving that equity might be done by fixing a period within which appellees, unhampered by pending litigation, might effect a sale to the United Verde Company, undertook to secure to appellant relief to which, upon the record at the trial, it was not entitled. If we concede appellant's view that the court's action was beyond its power, and in effect undertook to make a new contract for the parties, still we are unable to see how appellant was prejudiced thereby. The failure to accept the terms offered by the Court leaves the appellant in the position where strictly the record puts it—with its complaint dismissed for want of equity.

The appellant groups the assignments of error 6, 7 and 19, and under them argues that the trial court erred in not giving force and effect to the judgment of the Nebraska Court. The effect of the Nebraska decree presents an interesting question. The decision of the United States Supreme Court in Fall vs. Eastin, 215 U. S. 1,

would indicate that the ruling of the lower court on that subject was correct, but this question was only raised in this case
273 by the reply of the appellant to the cross-complaint of the appellees, and as the lower court gave no relief to appellees on such cross-complaint and dismissed the action for specific performance on other grounds, that feature of the case was never reached. We do not think that the point here attempted to be made will avail the appellant for the reason that the continuance in December, 1908, was granted to the appellant on the stipulation that if the case were continued, no judgment that might be secured in Douglas County, Nebraska, should be pleaded in this case. This estops the appellant from pleading the Nebraska judgment, and sustaining the court's ruling that it was "not entitled to recover anything herein under, by virtue or by reason of" such decree. The appellant does not contend that the commissioner's deed is valid or of any effect in this jurisdiction.

The decree that the commissioner's deed is void, and does not constitute a cloud upon the title to the West Brooklyn claim, while sound as a declaration of law, was not necessary to the determination of the question finally decided by the court, and for that reason has no place in the decree.

The record sustaining the trial court in dismissing the action, the judgment of the lower court is affirmed. For the full protection of the appellant from any prejudicial effect of any
274 portion of the decree other than that of dismissal, the judgment of this court is that the judgment and decree of the lower court be modified to read, "It is ordered, adjudged and decreed that plaintiff's action shall stand dismissed, and plaintiff shall take nothing thereby, and that defendants shall have and recover from the plaintiff their costs herein, taxed at $37,35." As so modified, the judgment of the lower court is affirmed.

FLETCHER M. DOAN,
Associate Justice.

We concur:
EDWARD KENT, *Chief Justice.*
JOHN H. CAMPBELL, *Associate Justice.*
ERNEST W. LEWIS, *Associate Justice.*
EDWARD M. DOE, *Associate Justice.*

And on the same day, to-wit: the second day of April, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

275 No. 1135.

BROOKLYN MINING & MILLING COMPANY, a Corporation, Appellant,
vs.
CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER No. 2, and GEORGE MILLER, Appellees.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment and decree of the lower court be, and the same is hereby, modified to read:

"It is ordered, adjudged and decreed that plaintiff's action shall stand dismissed, and plaintiff shall take nothing thereby, and that defendants shall have and recover from the plaintiff their costs herein, taxed at $37.35." and as so modified, the judgment of the lower court is affirmed.

It is further ordered, adjudged and decreed that the appellees herein do have and recover of and from the Brooklyn Mining and Milling Company, a corporation, appellant, and the United States Fidelity and Guaranty Company, surety on appeal bond herein, their costs in this court, taxed at forty-one and 75/100 ($41.75) dollars, together with their costs in the court below.

276 And on to-wit: the twelfth day of April, 1910, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause its certain Motion for Rehearing, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1135.

BROOKLYN MINING & MILLING COMPANY, a Corporation, Appellant,
vs.
CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER No. 2, and GEORGE MILLER, Appellees.

Appeal from the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai.

Petition for Rehearing.

Comes now appellant in above entitled appeal and moves the Court to grant a rehearing of said appeal, and for grounds of said motion shows to the Court:

I.

That the Court in its decision, rendered on the 2nd day of April, 1910, herein, erred in refusing to reverse the judgment appealed from and to decree to appellant the relief asked for in the court below, and in ordering that appellant's bill of complaint be dismissed for the reason (*a*) that under the proof in the case appellant was clearly entitled to the relief asked for, as shown by the
277 contract set out in the pleadings and in said decision: for the further reason (*b*) that the decision of the Court in dismissing plaintiff's bill and affirming the judgment of the lower court leaves appellant absolutely stripped of all of its property and entirely remediless; for the further reason (*c*) that the answer of the defendants to the pleadings in the case shows that if appellant was not entitled to all of the relief asked for in its com-

plaint it was entitled to have decreed to it the other property sued for.

II.

The Court erred in its said decision in holding that the failure of appellant to dismiss its suit under the agreement was a condition precedent to the enforcement of the contract, for the reason (*a*) that the proof clearly shows that the defendants did not consummate a sale of the West Brooklyn Claim to the United Verde Copper Company prior to January 1, 1908; and for the further reason (*b*) that there was nothing in said contract compelling appellant to dismiss its suit prior to January 1, 1908, and appellant did dismiss said suit before it commenced this action; and for the further reason (*c*) that the proof clearly shows that instead of trying to sell the West Brooklyn to the United Verde Copper Company appellees were undertaking to compel the United Verde Copper Company to buy the West Brooklyn and White Rock claims for Twenty Thousand Dollars—see undisputed testimony of C. C. Miller, Tran-
278 script, folio 651, wherein he says: "The West Brooklyn was never referred to as a single claim. When they bought they bought both claims; when they pay for it they pay for both claims." The contract for the purchase of the West Brooklyn Claim as a single claim was never referred to prior to January 1, 1908. See testimony of W. L. Clark, folio 703 et seq., Abstract of Record, wherein Mr. Clark says: "The conversation regarding the purchase of the West Brooklyn as a single claim took place in the spring of 1908. Prior to that time he had left the matter in the hands of his attorneys."

III.

The Court erred in its said decision in holding that the failure to dismiss prevented a sale of the property to the United Verde Copper Company, for the reason that the testimony clearly shows as above quoted that so far as the West Brooklyn is concerned no offer of the United Verde Copper Company had been made for the same prior to January 1, 1908, for Ten Thousand Dollars or any other sum, and the Millers had never agreed to accept the sum of Ten Thousand Dollars or any other sum for the West Brooklyn Claim alone prior to that time, but always insisted that the United Verde Copper Company if it purchased one claim must purchase both and pay Twenty Thousand Dollars for same.

279 IV.

That the Court erred in its said decision in holding that action 4923, filed on February 15, 1908, after the dismissal of action 4541, was of the same general character as said action 4541, for the reason that action 4923 was an action to require defendants, appellees herein, to specifically perform said contract, and the action numbered 4541 was an action brought by Pearsall originally to declare defendants trustees for the use and benefit of plaintiff, appellant herein, in the West Brooklyn Mining Claim; and for the further

reason that action 4923 and action 4927 are the actions which are of the same general nature, and action 4923 was dismissed for the reason that the Court held it had been prematurely brought before the dismissal of action 4541 in open court.

V.

The Court erred in its said decision in holding that the stipulation of December 23, 1908, providing that if the case was continued any judgment obtained in Nebraska would not be pleaded in this action, plaintiff was estopped from pleading same, for the reason that the requirements of such stipulation were unreasonable and deprived appellant of substantial rights; and for the further reason that after said stipulation had been made appellees filed in said action a cross-complaint setting up that they were the owners of the West Brooklyn claim—see cross-complaint of defend-
280 ants, folios 83 to 89, Abstract of the Record, filed March 25, 1909—while prior to that time and at the time of the making of said stipulation defendants claimed no title whatever to the West Brooklyn claim; and for the further reason that the decree and judgment of the Nebraska court is a decree and judgment of a court of co-ordinate jurisdiction of a sister state and is entitled to full faith and credit and it was a violation of the Constitution of the United States to disregard the same, as well as the rule of comity between states.

VI.

That the Court erred in its decision in holding that it would be inequitable to permit appellant to obtain the relief asked for and states that it would be permitted to take advantage of its own wrong, for the reason that the proof clearly shows that the appellees on January 2, 1908, came into court and pretended that they had consummated a sale to the United Verde Copper Company and made a pretended tender of certain sums of money and stock, mentioned in the contract,—see defendants' amended answer, folios 63 to 66, Abstract of the Record,—wherein it is alleged that they had entirely complied with the contract, and the effect of said holding is to permit appellees to take advantage of their own wrong and to obtain all of appellant's property and leave it remediless.

281

VII.

That the Court erred in its said decision in failing to reverse said judgment for the reason that the evidence in the case clearly shows that the failure to dismiss action 4541 did not prevent the sale to the United Verde Copper Company, and a careful study of the testimony shows that appellees never intended to carry out said contract.

VII-.

(a) Said decision is contrary to equity and contrary to law for the reason that it takes all of the property of appellant and gives it absolutely and unconditionally to the defendants without any consideration whatever therefor.

(*b*) It is further inequitable for the reason that appellant and all of its stockholders are deprived of their property and the same given by the Court to the defendants, appellees herein, when the evidence clearly shows no sale was ever consummated or undertaken to be consummated of the West Brooklyn claim by the appellees in accordance with the terms of their contract.

(*c*) It is further inequitable for the reason that the evidence clearly shows that the Millers never intended to sell the West Brooklyn mining claim to the United Verde Copper Company unless they could also make the United Verde Copper Company pay them Ten Thousand Dollars additional, which sum was to go to them
282 for the claim called the White Rock claim, owned by the Millers.

(*d*) It is further inequitable in holding that because appellant did not dismiss its action 4541 prior to January 1, 1908, and made the mistake of applying to the court in said action for the relief to which it is entitled to under the contract, it was not entitled to any relief under said contract and when it did dismiss said action before bringing an independent action for specific performance it should by reason of said action be deprived of all its property and the same should be given to appellees and its bill of complaint dismissed.

(*e*) The decision of the Court is further inequitable in that if appellees had consummated the sale or had been prevented from consummating the sale they could have compelled specific performance of said contract on the part of appellant, and the effect of said decision, by its holding that appellant now has no remedy, destroys all of the rights and takes away all of the property of innocent stockholders of appellant and gives all of their property to appellees.

(*f*) The decision of the Court is further inequitable in this—a reading of the complaint in action 4541, offered in evidence by defendants (Transcript of Record, folio 502) will disclose that it was an action originally instituted by Charles W. Pearsall on behalf of himself and other stockholders of the appellant showing that
283 the appellant was a corporation promoted by the Millers and Lasbury, and that they sold sold stock in the corporation on the representation that it was the owner of certain mining claims, including the West Brooklyn Claim, and said claim instead of being owned by the company was located in the name of Miller and others, and the action was to declare them trustees for the corporation and require them to convey same, and the contract now sought to be enforced was a settlement of all this litigation and under its terms would vest the property in the appellant or give it certain avails therefor should the West Brooklyn be sold to the United Verde Copper Company for Ten Thousand Dollars on or before January 1, 1908; otherwise, its title was to be absolutely vested in appellant, and now under the decision of the Court, after appellant has exhausted its remedy and its bill is dismissed, the effect of said decision is to take away all of the property owned by appellant and give it to the persons who sold stock to the stockholders of appellant on the representation that the West Brooklyn Claim belonged to appellant herein.

Appellant in support of its said petition relies upon its abstract of the records, its briefs heretofore filed and the record on file in this cause.

Wherefore, appellant asks that a rehearng be granted and
284 that said decision be reversed.

Dated, Prescott, Arizona, April 11, 1910.

Respectfully submitted,

F. S. HOWELL,
THOMAS C. JOB,
JNO. J. HAWKINS,
Attorneys for Appellant.

And on to-wit: the twentieth day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant, be submitted.

And on to-wit: the twenty-first day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

285 Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant, and heretofore submitted, be, and the same is hereby, denied.

And on the same day to-wit: the twenty-first day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day comes Mr. Jno. J. Hawkins for appellant herein, in open court, and gives notice of appeal to the Supreme Court of the United States, from the judgment of this Court, and

Upon motion of Mr. Jno. J. Hawkins, it is ordered that the notice of appeal be entered, the appeal be, and the same is hereby, allowed, and the amount of the cost bond be fixed in the sum of One Thousand ($1,000.) Dollars.

And on to-wit: the twenty-eighth day of June, 1910, came the appellant by their attorneys and filed in the clerk's office of said court

in said entitled cause its certain Petition for and Allowance of Appeal, in words and figures following, to-wit:

286 In the Supreme Court of the Territory of Arizona.

No. 1135.

BROOKLYN MINING AND MILLING COMPANY, a Corporation, Appellant,

v.

CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER, No. 2, and GEORGE MILLER, Appellees.

Appeal from the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai.

Appeal and Allowance.

The above named appellant, Brooklyn Mining and Milling Company, a corporation, conceiving itself aggrieved by the judgment entered on the 2nd day of April, 1910, and the order denying appellant's petition for rehearing entered on the 20th day of May, 1910, in the above entitled proceeding, doth hereby appeal from said judgment and order to the Supreme Court of the United States, and it prays that this its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

JOHN J. HAWKINS,
F. S. HOWELL,
THOS. C. JOB,
Attorneys for Appellant.

287 And now, to-wit, on this 24th day of June, 1910, the appeal prayed for in the foregoing petition is hereby allowed with citation to issue on filing of bond in the penal sum of One Thousand Dollars, with good and sufficient sureties to be approved by the Chief Justice of the said Supreme Court of Arizona.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

And on the same day to-wit: the twenty-eighth day of June, 1910, came the appellant and filed in the clerk's office of said court in said entitled cause its certain Affidavit of Value in Dispute in words and figures following, to-wit:—

In the Supreme Court of the Territory of Arizona, January Term, 1910.

No. 1135.

BROOKLYN MINING AND MILLING COMPANY, a Corporation, Appellant,

v.

CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER, No. 2, and GEORGE MILLER, Appellees.

Affidavit of Value in Dispute.

288 STATE OF NEBRASKA,
County of Douglas, ss:

Charles W. Pearsall, of lawful age, being first duly sworn, on his oath deposes and says: that he is the President of the appellant, and agent in its behalf; that he makes this affidavit for and on behalf of appellant; that the matter in dispute in said above entitled cause, exclusive of costs, exceeds the sum of Five Thousand Dollars.

CHARLES W. PEARSALL.

Subscribed and sworn to before me this 18" day of June, 1910.

[SEAL.] D. W. DICKINSON,
Notary Public.

My commission expires Apr. 28, 1916.

And on the same day to-wit: the twenty-eighth day of June, 1910, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause its certain Assignment of Errors, in words and figures following, to-wit:—

289 Supreme Court of the United States.

BROOKLYN MINING & MILLING COMPANY, a Corporation, Appellant,

vs.

CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER, No. 2, and GEORGE MILLER, Appellees.

Appeal from the Supreme Court of the Territory of Arizona, in Cause No. 1135.

Assignment of Errors on Appeal.

The appellant in said cause, Brooklyn Mining & Milling Company, a corporation in connection with its appeal and as a part thereof, makes the following assignments of error which it avers occurred at the trial of the cause, to-wit:—

1.

The Supreme Court of the Territory of Arizona erred in modifying the decree of the trial court, and in affirming the same as so modified.

2.

The court erred in holding the complaint of appellant should be dismissed for want of equity.

3.

The court erred in holding that appellant had no right to
290 compel specific performance of the contract declared on, and that it was itself at fault in not dismissing its suit No. 4541 before January 1, 1908, and that it thus prevented appellees from consummating a sale of the West Brooklyn mining claim to the United Verde Copper Company prior to that date; for the reason that the findings and special verdict of the Court show that said suit was instituted by Chas. W. Pearsall in behalf of himself and other stockholders of appellant, against the Millers and Lasbury, and the Company in December 1906, for the purpose of having it declared that they, the Millers and Lasbury, held the legal title to the West Brooklyn, East Brooklyn and South Brooklyn Mining Claims in trust for appellant, and to require them to convey said claims to the Company. At this time the Millers and Lasbury were in control of the Company, and this complaint was what is termed a minority stockholders' action to protect the rights of the Company. In July 1907 Pearsall and other stockholders having, at an election of the stockholders of the Company, acquired control of the Board of Directors of the Company, filed an amended complaint in this action No. 4541 naming the appellant as plaintiff against the Millers and Lasbury as defendants. C. C. Miller in May 1907 brought an action for $5,000.00 against the Company. For the purpose of disposing of and compromising this litigation the contract sued on by appellant was entered into. This contract was
entered into "in consideration of the dismissal and settle-
291 ment of the said causes of action". This contract was a reciprocal contract, binding on both parties, and from the date of its execution, August 27, 1907, both of said causes of action were extinguished and dismissed and it was error in the court not to so hold.

It was manifest error in the court to hold that because formal dismissal of said action in open court was not made until February 15, 1908, that a consummation of a sale of the West Brooklyn claim to the United Verde Copper Company was thereby prevented, for the reason that if said fact had existed appellees could have applied to the court in said action for a formal dismissal of same and an exhibition of said contract would have secured such relief, if such fact existed.

4.

It was manifest error for the court to affirm the judgment and decree of the lower court and dismiss appellant's complaint for the reason that the court finds that no sale of the West Brooklyn was consummated prior to January 1, 1908, by appellees to the party mentioned in the contract, and the effect of said judgment is to take appellant's property and give it to appellees without any remedy on the part of appellant ever to recover same or the value thereof.

5.

It was manifest error in the court to hold "in September
292 1906, Miller and Lasbury gave an option to the United Verde Copper Company for the purchase of the West Brooklyn and White Rock claims (the latter does not figure in this suit) for Twenty Thousand Dollars. The term of this option does not definitely appear, but it was extended at different times and kept in force up to January 1, 1908."; for the reason that the option is set out at length in the record as Appellant's Exhibit "O," and is the only option given, and the same was extended to January 1, 1908, verbally, and the testimony of Miller and Clark (the latter representing the United Verde Copper Company) shows conclusively that Miller would not sell the West Brooklyn alone for $10,000.00 unless Clark purchased for the United Verde Copper Company the White Rock claim (which was the property of the Millers) for a like sum of $10,000.00 prior to January 1, 1908. C. C. Miller says: "The West Brooklyn was never referred to as a single claim. When they bought, they bought both claims: when they pay for it, they pay for both claims." Clark says a deed for West Brooklyn and White Rock at $20,000.00 for the two claims was sent him by the attorneys prior to January 1, 1908, and he declined same; that "prior to January 1, 1908, the matter was in the hands of the attorneys" and it was not until the spring of 1908 that the purchase of the West Brooklyn as a single claim at $10,000.00 was talked of.

It is further fully shown that appellees never claimed to
293 have been prevented by the failure of appellant to formally dismiss its suit from making such sale until they filed their amended answer and cross-complaint Feb'y 8, 1909, & again on March 25, 1909. The facts and findings show that on January 2, 1908, consummation of the sale of the West Brooklyn was claimed and a tender of the performance of the obligations of the appellees under the agreement of August 27, 1907, was made. Appellant declined the tender (as the Court finds) on the ground that it did not fully comply with the terms of the agreement. No claim was made then that they had been prevented from selling to the United Verde by the failure upon the part of the appellant to dismiss suit No. 4541. The tender did not comply with the terms of said contract for the reason that no sale had been consummated, and the court so found, and the judgment and decree was erroneous and should have been in favor of appellant.

6.

It was manifest error for the court to hold that appellant was entitled to no rights by virtue of the Nebraska judgment, for the reason that the same is a personal judgment in favor of appellant against George B. Lasbury and Ada M. Miller adjudicating the rights of the respective parties under said contract, and, as such judgment of a sister state, was entitled to full faith and credit.

7.

It was manifest error for the court to hold that appellant
294 could not plead the Nebraska judgment by reason of a stipulation regarding a continuance granted in December 1908. for the reason that at such time the state of the pleadings showed that appellees did not claim any title to the West Brooklyn and the other claims mentioned in the contract, but had theretofore tendered performance, and if performance had not been made they were to convey to appellant, and if it had been made they were to convey the other claims mentioned in the contract to appellant and pay the consideration mentioned in the contract, received for West Brooklyn. to appellant; and said judgment was pleaded only to the answer and cross-complaint filed in March 1909.

8.

It was error for the court to hold that the making of such stipulation regarding a continuance granted in December 1908, for the reason that at such time the state of the pleadings showed that the pleadings at the time.

9.

It was manifest error for the Court not to consider the Nebraska judgment, notwithstanding the state of the pleadings, since that judgment whether pleaded or not was conclusive as between appellant and Ada M. Miller and the interest of George B. Lasbury, as to the facts;

(1) That appellant had performed all the obligations required by the contract to be by it performed;

(2) That no sale of the West Brooklyn had been con-
295 summated between appellees or any of them, or the said George B. Lasbury and the United Verde Copper Company prior to January 1, 1908, and

(3) That the failure to dismiss the suit No. 4541 did not interfere with, hinder or prevent the consummation of such sale:

such finding and determination precluding further investigation of those facts as between appellant and Ada M. Miller and George B. Lasbury, and it was manifest error for the Supreme Court to find otherwise on evidence offered on the trial of the case in Arizona (where the same questions were material to the issue) notwithstanding the stipulation, and notwithstanding that the judgment of the Nebraska Court might not have been pleaded as an estoppel or res

adjudicata, said judgment of the Nebraska Court having been properly admitted in evidence upon the trial though improperly pleaded or not pleaded at all.

Two of the issues to be tried in the Arizona Court were whether appellant had performed all of its obligations under the contract in suit, and whether appellant had prevented consummation of the sale of the West Brooklyn mining claim to the United Verde Copper Company. These were issues of fact in the Nebraska suit. In the Nebraska suit those issues were litigated, found and adjudicated in favor of appellant. These same facts being in issue under the pleadings in Arizona, were, under general denial, susceptible of proof by the record of the Nebraska judgment insofar as
296 the same affected the interest represented in the Nebraska suit by or through Ada M. Miller and George B. Lasbury.

The record of the judgment in the Nebraska suit, being admissable in evidence, without being specially pleaded, was, as an evidential fact, conclusive of the matters put in issue and actually determined by the Nebraska judgment.

10.

The judgment and decree of the Court is contrary to law and equity.

11.

The judgment of affirmance dismissing appellant's complaint is contrary to equity in this—that appellant from the time of making the contract abandoned its cause of action against appellees and has dismissed the same. The consideration of said contract concludes appellant from any remedy; it loses all of its property, and the decision of the Court, in effect, gives it all to appellees.

12.

The judgment of the Court is contrary to the facts in the case as found by the Court, in this—that the Court finds that appellees have the legal title to the West Brooklyn and other claims mentioned in the contract, and that the basis of appellant's title is the contract sought to be enforced by appellant, and a dismissal of the complaint leaves appellant entirely remediless—stripped of all its property and the same given to appellees.

297 Wherefore, the Brooklyn Mining and Milling Company, a corporation, appellant herein, prays that the said judgment of the Supreme Court of the Territory of Arizona be reversed and the said Supreme Court of the Territory of Arizona be ordered to enter an order reversing the decree of the lower court in said case.

June 24th, 1910.

JNO. J. HAWKINS,
THOMAS C. JOB,
F. S. HOWELL,
Attorneys for Appellant.

And on the same day to-wit: the twenty-eighth day of June, 1910, came the appellant and filed in the clerk's office of said Court in said entitled cause its certain Bond on Appeal in words and figures following, to-wit:—

298 Supreme Court of the United States.

BROOKLYN MINING & MILLING COMPANY, a Corporation, Appellants,
v.
CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER No. 2, and GEORGE MILLER, Appellees.

Appeal from the Supreme Court of the Territory of Arizona.

Bond on Appeal.

Know all men by these presents: That we, Brooklyn Mining and Milling Company, a corporation having its principal office at Prescott, Arizona, as principal, and the United States Fidelity & Guaranty Co., as surety, are held and firmly bound unto Charles C. Miller, George B. Lasbury, Ada M. Miller, Charles C. Miller No. 2, and George Miller, in the sum of One Thousand Dollars ($1000.00), lawful money of the United States, to be paid to them and their representatives, executors, administrators and successors, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, firmly by these presents.

Sealed with our seals and dated this 24th day of June, A. D. 1910.

Whereas, the above named Brooklyn Mining and Milling
299 Company has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of affirmance in the above entitled action by the Supreme Court of the Territory of Arizona, being cause No. 1135 therein:

Now, therefore, the condition of this obligation is such that if the above named Brooklyn Mining and Milling Company shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

BROOKLYN MINING & MILLING COMPANY,
[SEAL.] By CHAS. W. PEARSALL, *President.*
Attest:
E. W. NORTH, *Secretary.*

THE UNITED STATES FIDELITY & GUARANTY CO.,
[SEAL.] By L. B. LARIMER AND JNO. J. HAWKINS, *Its Attorneys in Fact.*

The within bond is approved both as to sufficiency and form this 24th day of June, A. D. 1910.

EDWARD KENT,
Chief Justice of Supreme Court of the Territory of Arizona.

300 And on the same day to-wit: the twenty-eighth day of June, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Findings of Fact in the nature of a special verdict, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1135.

BROOKLYN MINING & MILLING COMPANY, a Corporation, Appellants,
v.
CHARLES C. MILLER, GEORGE B. LASBURY, ADA M. MILLER, CHARLES C. MILLER No. 2, and GEORGE MILLER, Appellees.

Appeal from the District Court of Yavapai County, Arizona.

Findings of Territorial Supreme Court.

Brooklyn Mining and Milling Company, appellant in the above entitled cause, having prayed an appeal from the judgment and decision of this Court heretofore entered on the second day of April, 1910, and said appeal having been allowed, this Court does hereby make and certify, in accordance with law and the rules of the Supreme Court of the United States, the following statement of facts in the nature of a special verdict herein, the same being the facts as set forth in the opinion of the Court as follows:

301 Prior to December, 1906, the appellant, Brooklyn Mining and Milling Company, a corporation, was the owner of the Brooklyn mining claim in Yavapai County, Arizona. Charles W. Pearsall was then and at all times since has been a stockholder of that corporation, and ever since January, 1907, has been president thereof. Alonzo V. Miller, George B. Lasbury, and Charles C. Miller were also stockholders in said company, and prior to December, 1906, had located in their own name, together with one Thomas H. Ensor as co-locator three mining claims adjoining the Brooklyn claim, known as the West Brooklyn, the East Brooklyn and the South Brooklyn claims. In August, 1906, Lasbury acquired Ensor's interest in the three claims by deed recorded September 18th, 1906, after which date Alonzo V. Miller, George B. Lasbury and Charles C. Miller were the record owners of said claims. In September 1906, Miller and Lasbury gave an option to the United Verde Copper Company for the purchase of the West Brooklyn claim and the White Rock claim (which does not figure in this suit), for the sum of twenty thousand dollars. The term of this option does not definitely appear, but it was extended at different times and kept in force up to January 1st, 1908.

In December, 1906, Pearsall, in behalf of himself and other stockholders instituted a suit (No. 4541) in the District Court of Yavapai County against the Millers and Lasbury for the purpose of having it declared that the Millers and Lasbury held the title to the
302 West, East and South Brooklyn claims in trust for the Brooklyn Company, and to require them to convey said claims to

the company. An amended complaint was filed on July 7th, 1907, in this action naming the Brooklyn Mining Company as plaintiff. In May, 1907, Charles C. Miller brought suit against the Brooklyn Company for five thousand dollars claimed to be due him for work done upon the Brooklyn claim. While both suits were yet pending a compromise agreement was made between the parties on August 27th, 1907, as follows:

"Whereas, an action is now pending in the District Court of Yavapai County, Arizona, entitled Brooklyn Mining & Milling Company et al. vs. Charles C. Miller, Alonzo V. Miller and George B. Lasbury, which action relates to the title of the West Brooklyn, East Brooklyn and South Brooklyn Mining Claims located in said County and Territory, and relates to an accounting for ores and minerals taken therefrom, and

"Whereas, The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury have made a conditional sale of the above named West Brooklyn Mining claim for the sum of ten thousand dollars to the United Verde Copper Company, and

"Whereas, an action is pending in the District Court of Yavapai County, Arizona, entitled Charles C. Miller v. Brooklyn Mining & Milling Company for several thousand dollars claimed to be due and owing to the said Charles C. Miller for services performed by him and Alonzo V. Miller for the said Brooklyn Mining & Milling Company, and

"Whereas, It is the desire of the parties connected with the foregoing causes of action to settle the same, and to adjust the matters of difference between the parties in connection therewith;

"Therefore, In consideration of the dismissal and settlement of the foregoing causes of action it is hereby stipulated and agreed by and between the Brooklyn Mining & Milling Company and
303 Charles C. Miller, Alonzo V. Miller and George B. Lasbury that if the sale of the West Brooklyn Mining claim to the United Verde Copper Company is consummated on or before the first day of January, 1908, the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to transfer and deliver to the said Brooklyn Mining & Milling Company one hundred and seventy-five thousand shares (175,000) of stock in said Brooklyn Mining & Milling Company, free and clear of all liens and incumbrances whatsoever; it being understood that said transfer of stock is to include all of the holdings of said Charles C. Miller, Alonzo V. Miller and George B. Lasbury in the Brooklyn Mining & Milling Company, and the said parties are to receive therefor the sum of 3 (Three) cents per share for said stock; and in addition thereto Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to pay to the Brooklyn Mining & Milling Company the sum of eight thousand, five hundred dollars ($8,500.00) out of the proceeds derived from the sale of the said West Brooklyn mining claim; in addition thereto the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey all of their right, title and interest in and to the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and said transfer shall contain the warranty that the

assessment work has been done for the year 1907 upon the Empress, Midway and North Brooklyn, and the said Brooklyn Mining & Milling Company shall pay the said assessment work at its reasonable value. The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury agree to do the assessment work for the year 1907, on the East and South Brooklyn mining claims, and said assessment work so to be performed is to be paid for by the Brooklyn Mining & Milling Company at its reasonable value. It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury shall not be consummated on or before the first day of January, 1908, then the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey to the Brooklyn Mining & Milling Company all of their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims. and the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value.

304 It is understood by and between the parties hereto that the foregoing does not concede or admit any of the allegations contained in the pleadings of said causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties and avoiding further costs and expenses to the parties hereto.

In Witness Whereof, We have hereunto set our hands this 27th day of August, A. D., 1907.

C. C. MILLER.
A. V. MILLER.
G. B. LASBURY.
BROOKLYN MINING & MILLING COMPANY,
By CHAS W. PEARSALL, *President.*"

On December 17th, 1907, Alonzo V. Miller executed, acknowledged and delivered to Ada M. Miller a deed, conveying to her his interest in the West Brooklyn claim. On December 18th, 1907, Alonzo V. Miller died, leaving a widow, Ada A. Miller, and two sons, viz.: Charles C. Miller No. 2, and George M. Miller, a minor.

In December, 1907, counsel for Lasbury and the Millers requested a dismissal of action No. 4541 and directed a dismissal of No. 4608 (the case of Miller v. the Company). Counsel for the company declined to dismiss the case against the Millers, and the formal dismissal of the Miller case was not entered of record until January 2nd, 1908.

On January 2, 1908, the case of Miller against the Brooklyn Company, No. 4608, was dismissed. On the same date defendants filed in action No. 4541 their written motion to dismiss said action. Consummation of the sale of the West Brooklyn to the United Verde Com-

pany was claimed, and a tender of performance of the obliga-
305 tion of the Millers and Lasbury, under the agreement of August 27, 1907, was made. This tender was refused by counsel for the appellant on the ground that it did not fully comply with the terms of the agreement, and counsel again declined to dismiss the suit, No. 4541.

On January 28, 1908, the Brooklyn Company brought suit in the District Court of Douglas County, Nebraska, against Charles C. Miller, George B. Lasbury and the survivors of Alonzo V. Miller, viz: Ada M. Miller, Charles C. Miller No. 2 and George M. Miller, a minor, for the specific performance of the agreement of August 27, 1907, and George B. Lasbury and Ada M. Miller were personally served with process in Nebraska.

On February 11, 1908, the Brooklyn Company filed a supplemental complaint in case No. 4541, in which it set up the contract of August 27, 1907, and asked for specific performance thereof, by requiring defendants to convey the West Brooklyn claim, and others, to plaintiff.

On February 15, 1908, the Brooklyn Company dismissed action No. 4541 involving the title to the West Brooklyn claim, being the action, the dismissal of which was stipulated in the agreement of August 27, 1907, and on the same date, immediately thereafter, filed another action No. 4923, for specific performance of the contract of August 27, 1907, wherein the company claimed ownership of the West Brooklyn by virtue of the contract of August 27, 1907,
306 and asked that defendants be required to convey the same to the Company, and that the Company's title therein be quieted. On February 18, at 9 o'clock A. M., the Brooklyn Company dismissed action No. 4923, and on that date at 9:10 A. M., filed the case at bar, No. 4927.

The actions numbered 4541, in which a lis pendens was filed, and 4923 and 4927, and the suit brought in Nebraska on January 28, 1908, all involved the title to the West Brooklyn claim, and in all of said actions the Brooklyn Company sought a specific performance of the contract of August 27, 1907. In action 4541 specific performance was asked by the supplemental petition above mentioned.

On December 23, 1908, the case at bar came on for trial in Yavapai County, and the plaintiff asked for a continuance. This was contested by the defendants, and the pendency of the action in Nebraska urged by them as ground for a trial at that time. It was then stipulated that if the case was continued no judgment which might be secured in Douglas County, Nebraska, should be pleaded in this action, "that counsel for appellant thereupon stated in effect, that they would agree if said cause were continued that no judgment which might be secured in the District Court of Douglas County, Nebraska, in an action then pending between the same parties should be pleaded in this action, whereupon the following colloquy took place:

307 "By Mr. Norris (counsel for appellees): It is stipulated that no judgment in the Omaha court will be pleaded in this court, and it is admitted that it can have no effect on the trial of the proceedings in this court.

By Mr. Jon (counsel for appellant): That is going beyond my province, as to what effect it will have.

By Mr. Norris: I assert it, and our correspondence clearly shows that.

By Mr. Ross (counsel for appellees): That is sufficient, that will not be pleaded.

By the Court: Yes, if it is not pleaded it will not amount to anything."

Thereupon, the continuance was granted on the motion and at the cost of the Brooklyn Mining & Milling Company, plaintiff.

On February 8, 1909, the Nebraska case was decided in favor of the company. The Nebraska court held that the sale of the West Brooklyn had not been consummated as provided for in the agreement of August 27, 1907, and decreed that George B. Lasbury and Ada M. Miller specifically perform the obligations devolving upon them under the compromise agreement by reason of the non-consummation of the said sale, and decree that George B. Lasbury and Ada Miller convey to the Brooklyn Company all their right, title and interest in the West Brooklyn claim and the five other claims named in the compromise agreement, and in default of their doing so a master be appointed by the court to make such conveyance. No parties to the Nebraska suit were served with process or appeared except Ada M. Miller and Lasbury. The master appointed by the court thereafter executed and delivered a conveyance of the claims mentioned to the Brooklyn Company.

308 On March 25, 1909, the case at bar came on for trial in the District Court of Yavapai County, and on April 24, 1909, judgment was rendered therein. Immediately prior to the trial of the case, and on March 23, 1909, the plaintiff filed a reply to the amended answer and cross-complaint (which amended answer and cross-complaint was filed February 8, 1909), in which reply it pleaded the judgment and decree of the Nebraska Court, and the conveyance by the commissioner thereunder. This reply was treated as a reply to the amended answer and cross-complaint filed March 25, 1909, which was substantially identical with that filed February 8, 1909, except that in the answer of March 25th George Miller, a minor, appeared by his guardian ad litem.

In a written decision filed on April 24th, the Court found that the sale of the West Brooklyn to the United Verde Copper Company by the defendants had not in fact been consummated on or before January 1st, 1908, but that the failure to consummate such sale was caused by the failure and refusal of the plaintiff to dismiss the action No. 4541 brought by the plaintiff against the defendants in December, 1906, which involved the title to the West Brooklyn claim, and the dismissal of which was made obligatory upon the plaintiff by the terms of the agreement. The court found from the record that this suit was not dismissed until February 15th, 1908, and that another similar suit was brought by the plaintiff
309 before an opportunity was afforded the defendants to consummate said sale. That the defendants, prior to January 1st, 1908, endeavored to effect the sale to the United Verde, and

that the pending litigation prevented such sale; that the United Verde had ever since been willing to make the purchase at the price of ten thousand dollars if pending litigation was dismissed, and a clear title could thereby be given them. The court then held that the plaintiff was not then in a position to enforce specific performance on the part of the defendants for the reason that it was itself at fault in not dismissing the litigation, thus removing the obstacle to the negotiation and consummation of the sale. The court further held that as all the parties were before the court, and the agreement was regarded by the parties as still in force, that he would not dismiss the action, but would grant to the defendants reasonable time to consummate the sale under the terms of the agreement. The judgment of the court therefore was that an interlocutory order and decree be entered, giving the defendants ninety days from that date to make the sale and comply with the other terms of the agreement. Thereupon the court caused an interlocutory decree to be entered as follows:

"This cause came on regularly to be heard on the 25th day of March, 1909, plaintiff appearing by John J. Hawkins and T. C. Job, Esqs., its attorneys, and F. S. Howell of counsel, and defendants, Charles C. Miller, Ada M. Miller, Charles C. Miller No. 2 and George Miller, a minor, by Charles C. Miller No. 2, his guardian ad litem, appearing by Reese M. Ling, Esq., and Messrs. Norris & Ross, their attorneys.

310 A jury being expressly waived by both parties, the cause was tried to the court upon plaintiffs's amended and supplemental complaint, the amended answer and cross-complaint of defendants Charles C. Miller, Ada M. Miller, Charles C. Miller No. 2 and Charles C. Miller No. 2 as guardian ad litem of George Miller, a minor, and plaintiff's reply to said amended answer and cross-complaint, together with said defendants' motion to strike and replication addressed to said reply. Evidence both oral and documentary was introduced on behalf of the respective parties, and the parties rested, and the cause was submitted to the court for its decision and judgment. Thereafter it was argued to the court by counsel of the respective parties through written briefs.

The court having considered the evidence in said cause, the argument of counsel, and the principles of law and equity applicable thereto, and being fully advised in the premises, on the 24th day of April, 1909, made and filed its written decision herein, and orders that a judgment and decree be entered in accordance therewith.

Now therefore, for the purpose of giving defendants an opportunity to consummate the sale of the "West Brooklyn" mining claim to the United Verde Copper Company, or made a binding contract for such sale free and clear of all claims and litigations on the part of plaintiff touching or questioning said title, and in accordance with said written decision and for the purpose of fully determining the rights of the parties hereto under the contract sued upon an alternative decree is hereby made and entered herein as follows, to-wit:

(1) That within thirty (30) days from the date hereof plaintiff shall file herein its written consent that this decree conditional upon a sale of the "West Brooklyn" mining claim to the United Verde Copper Company as hereinafter provided shall become final, irrevocable and non-appealable, and consenting that said defendants within the time hereinafter stated may make a sale or a binding contract therefor of the "West Brooklyn" mining claim to the United Verde Copper Company free and clear of all claims and litigations on the part of plaintiff questioning or effecting the title to said claim.

(2) That if plaintiff shall fail, or refuse to file herein within said period of thirty days from the date hereof its written
311 consent and waiver as provided herein, then and in such event plaintiff's action herein shall stand dismissed as of this date, and plaintiff shall take nothing thereby.

(3) Ordered, adjudged and decreed that if within ninety days from the date hereof said defendants shall consummate or make a binding contract for the sale of "West Brooklyn" mining claim to the United Verde Copper Company, and shall deliver and pay over or tender to plaintiff herein the money, stocks, deed and proof of assessment work which is provided by the contract of August 27th, 1907, shall be paid over and delivered by defendants to plaintiff, then and thereupon this decree shall forthwith become final, irrevocable and non-appealable as of this date, and plaintiff shall be forever barred and estopped from claiming any right, title or interest in or to said West Brooklyn mining claim.

(4) Ordered, adjudged and decreed that if plaintiff within the period aforesaid shall file its said written consent and waiver as above provided, and defendants shall fail to make such sale or binding contract therefor to the United Verde Copper Company, and to pay over and deliver or tender the money, stocks, deed and proof of assessment work aforesaid within the said period of ninety days, then and thereupon defendants shall forthwith execute and deliver to plaintiff a valid and sufficient deed conveying to plaintiff all their right, title and interest in and to the "West Brooklyn" mining claim as mentioned and provided in said agreement of August 27th, 1907, and said agreement shall be fully carried out by all the parties hereto.

(5) Ordered, adjudged and decreed that plaintiff is not entitled to have or recover anything herein under, by virtue or by reason of that certain decree described in plaintiff's reply to defendants' cross-complaint herein rendered by the District Court of Douglas County, State of Nebraska, that the commissioner's deed made under and pursuant to said decree is void and of no force or effect, and that said deed does not constitute a cloud upon the title of the "West Brooklyn" mining claim.

(6) Ordered, adjudged and decreed that plaintiff is not in any event entitled to an accounting herein, or to have or recover in this action on account of silica heretofore sold or shipped by de-
312 fendants or any of them from the "West Brooklyn" mining

claim, and defendants shall have and recover from plaintiff their costs herein taxed at $37.35.

Done in open court this 24th day of April, 1909.

RICHARD E. SLOAN, *Judge.*"

The appellant failed and refused to file within thirty days after said decree its consent as provided in paragraphs 1, 3 and 4 of the same. Its failure and refusal to file its consent as provided in said decree, renders the decree as set forth in paragraphs 1, 3, 4, 5, and 6, inoperative, and leaves as a final and substantive decree only paragraph 2 dismissing the plaintiff's action.

The denial of an accounting as mentioned in paragraph 6 was inadvertently ordered, for the dismissal without prejudice of that part of the complaint which called for an accounting, on March 26, 1909, would prevent the court from adjudicating that question in this case.

It is conceded that the sale of the West Brooklyn to the United Verde Copper Company was not consummated prior to January 1, 1908, also that action No. 4541 entitled Brooklyn Mining & Milling Company vs. Charles C. Miller, Alonzo V. Miller, and George B. Lasbury, which related to the title of the West Brooklyn was not dismissed prior to January 1, 1908.

The trial Court found, and we think properly, that the failure by appellant to dismiss the action indicated in the contract, prevented appellees from consummating a sale to the United
313 Verde Copper Company within the period allowed them by the contract. Therefore, upon the state of facts existing at the time of the trial, appellant was not entitled to specific performance. We further find that the failure of appellant to accept the terms offered by the court in its decree leaves it in the position where the record puts it, with the complaint dismissed for want of equity.

In the trial court below plaintiff plead by reply to the cross-complaint of appellees, the Nebraska judgment and decree. The effect of the Nebraska decree presents an interesting question. But this question was only raised in this case by the reply of the appellant to the cross-complaint of the appellees, and as the lower court gave no relief to appellees on such cross-complaint and dismissed the action for specific performance on other grounds, that feature of the case was never reached.

We find that the Nebraska decree herein referred to is set out as exhibit "D" to appellant's reply to appellees' amended answer and cross-complaint, and was offered in evidence with appellant's Exhibit "L", and that the decision of the Nebraska court is set out as Exhibit "A" to appellees' replication; these references being made at this point to avoid repetition.

The appellant claims that it only plead the Nebraska decree because after the stipulation above mentioned had been made,
314 the appellees filed a cross-complaint claiming title to the property mentioned in the contract. We do not think that the contention attempted to be made will avail the appellant for the reason that the continuance of December 1908 was granted appellant

on the stipulation that if the case were continued, no judgment that might be secured in Douglas County, Nebraska, should be pleaded in the case. We find that this estops the appellant from pleading the Nebraska judgment, and sustains the lower court's ruling that it was "not entitled to recover anything herein under, by virtue of or by reason of" such decree. The appellant does not contend that the commissioner's deed is valid or of any effect in this jurisdiction. The decree that the commissioner's deed is void and does not constitute a cloud upon the title to the West Brooklyn claim, while sound as a declaration of law, was not necessary to the determination of the question finally decided by the court, and for that reason has no place in the decree.

As conclusions of law from the foregoing facts we find that the judgment of the lower court should be affirmed, but for full protection of the appellant from any prejudicial effect of any portion of the decree other than that of dismissal, the judgment of this court is that the judgment and decree of the lower court be modified to read, "It is ordered, adjudged and decreed that plaintiff's action shall stand dismissed, and plaintiff shall take nothing thereby, and that defendants shall have and recover from the plaintiff
315 their costs herein, taxed at $37.35.", and that such modification of the judgment of the lower court is affirmed.

Dated the 24th day of June, A. D. 1910.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

316 UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and Transcript of the Record, including the Abstract of Record, Opinion, Judgment, Motion for Rehearing, Petition for and Allowance of Appeal, Affidavit of Value in Dispute, Assignment of Errors, Bond on Appeal, Findings of Fact in the nature of a special verdict, and all minute entries had and entered of record in a certain cause lately pending in said court, No. 1135, wherein the Brooklyn Mining & Milling Company, a corporation, was appellant, and Charles C. Miller, George B. Lasbury, Ada M. Miller, Charles C. Miller No. 2, and George Miller, were appellees, as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Citation and Order of Enlargement are the originals issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said court, this 20th day of September, A. D. 1910, at Phœnix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court,
By ANGIE B. PARKER, *Deputy.*

317 *Citation on Appeal to Supreme Court.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to Charles C. Miller, George B. Lasbury, Ada M. Miller, Charles C. Miller No. 2, and George Miller, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 23 day of August, 1910, pursuant to an appeal filed in the Clerk's Office of the Supreme Court of the Territory of Arizona, wherein Brooklyn Mining and Milling Company, a corporation, is appellant, and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24 day of June, A. D. 1910.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

We hereby waive the service of the above citation on us, and consent that said citation, with this waiver, may be filed as complete service upon us, and as our appearance on said appeal.

T. G. NORRIS,
JOHN M. ROSS,
F. O. SMITH, &
REESE M. LING,
Attorneys for the Above-named Appellees,
Prescott, Ariz.

318 [Endorsed:] No. 1135. Brooklyn Mining & Milling Company, a corporation, Appellant, v. Charles C. Miller, et al., Appellees. Citation on Appeal to Supreme Court of United States. Jno. J. Hawkins, Thomas C. Job and F. S. Howell, Attorneys for Appellant, Prescott, Arizona. Filed June 28, 1910. F. A. Tritle, Jr., Clerk.

319 In the Supreme Court of the Territory of Arizona.

No. 1135.

BROOKLYN MINING AND MILLING COMPANY, a Corporation, Appellant,
vs.
CHARLES C. MILLER et al., Appellees.

It appearing that the Clerk of the above Court is unable to have the record ready for filing and said cause docketed in the Supreme Court of the United States by the return day,

It is ordered that the time of the above named appellant to file the record in the above cause, and to docket the above cause in the Supreme Court of the United States, be and the same is hereby extended until October 21, 1910.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

320 [Endorsed:] No. 1135. In the Supreme Court of the Territory of Arizona. Brooklyn Mining & Milling Co., vs. Charles C. Miller et al. Order enlarging time for filing and docketing cause. Filed August 19, 1910. F. A. Tritle, Jr., Clerk, by Angie B. Parker, Deputy.

Endorsed on cover: File No. 22,338. Arizona Territory Supreme Court. Term No. 144. Brooklyn Mining and Milling Company, appellant, vs. Charles C. Miller, George B. Lasbury, Ada M. Miller, Charles C. Miller, No. 2, and George Miller. Filed October 6th, 1910. File No. 22,338.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

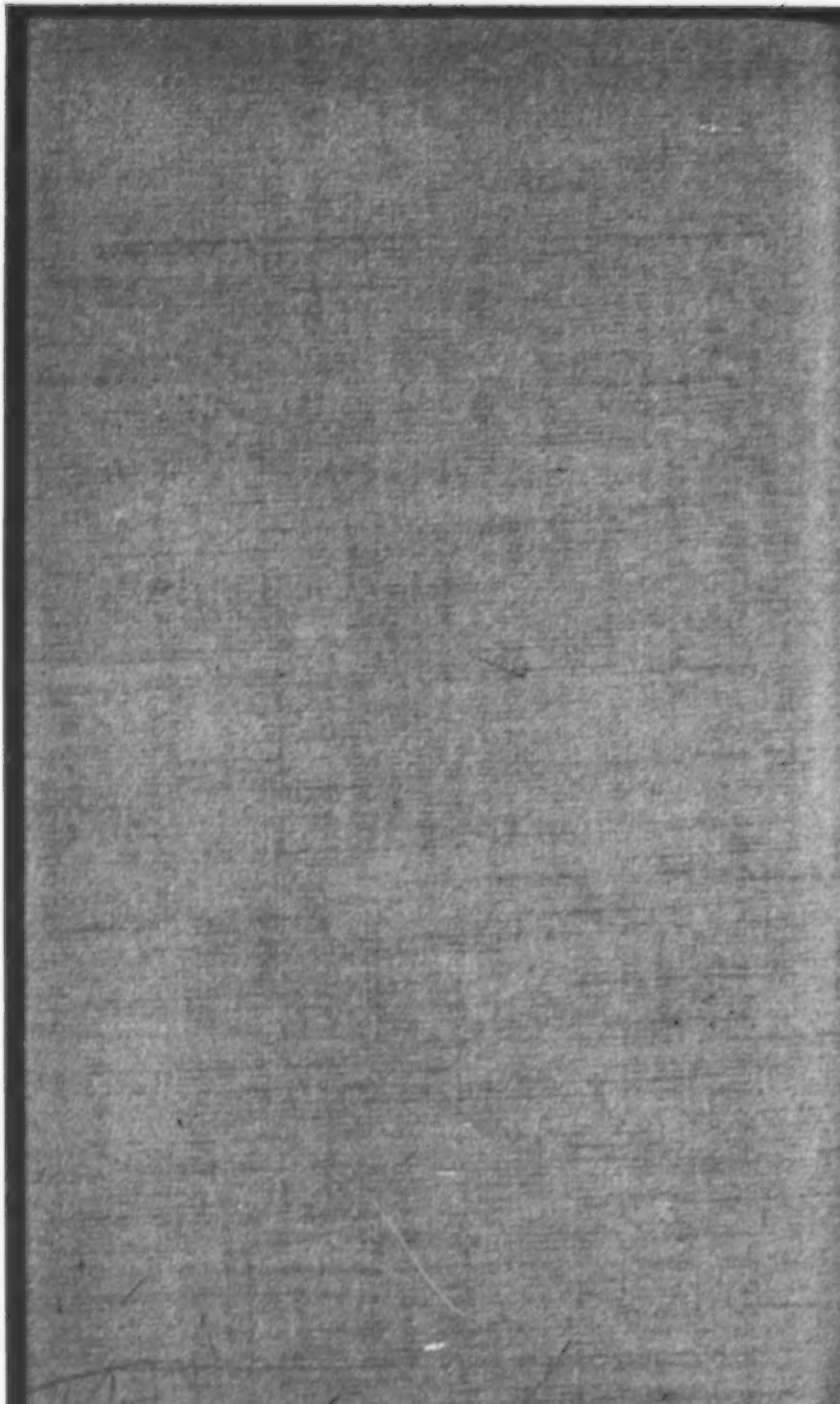
BROOKLYN MINING AND MILLING COMPANY,
Appellant.
vs.
CHARLES C. MILLER, ET AL.,
Appellees.
No. 144.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF ON BEHALF OF APPELLANT.

THOS. C. JOS,
A. W. JEFFERIS,
F. S. HOWELL,
Of Counsel.

JOHN J. HAWKINS,
Attorney for Appellant.



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STATEMENT.

This is an appeal from a judgment of the Supreme Court of the Territory of Arizona rendered April 2nd, 1910 (trans., 134-135), modifying and affirming the judgment and decree in equity of the District Court of the Fourth Judicial District of Arizona, dated April 24th, 1909, rendered by Mr. Justice Sloan, at Prescott, which decree is set out on pages 40 and 41 of the transcript.

The suit was brought by appellant against appellees upon a contract in writing dated August 27th, 1907, seeking the specific performance thereof. The contract sued upon (trans. 2) is as follows:

"Whereas, An action is now pending in the District Court of Yavapai County, Arizona, entitled Brooklyn Mining & Milling Company, et al, vs. Charles C. Miller, Alonzo V. Miller and George B. Lasbury, which action relates to the title to the West Brooklyn, East Brooklyn and South Brooklyn mining claims located in said county and territory, and relates to an accounting for ores and minerals taken therefrom, and

Whereas, The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury have made a conditional sale of the above named West Brooklyn Mining Claim for the sum of ten thousand dollars to the United Verde Copper Company, and

Whereas, An action is pending in the District Court of Yavapai County, Arizona, entitled Charles C. Miller vs. Brooklyn Mining & Milling Company for several thousand dollars claimed to be due and owing to the said Charles C. Miller for services performed by him and Alonzo V. Miller for the said Brooklyn Mining & Milling Company, and

Whereas, It is the desire of the parties connected with the foregoing causes of action to settle same and to adjust the matters of difference between said parties in connection therewith:

Therefore, In consideration of the dismissal and

settlement of the foregoing causes of action it is hereby stipulated and agreed by and between the Brooklyn Mining & Milling Company and Charles C. Miller, Alonzo V. Miller and George B. Lasbury that if the sale of the West Brooklyn Mining Claim to the said United Verde Copper Company is consummated on or before the first day of January, 1908, the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to transfer and deliver to the said Brooklyn Mining & Milling Company one hundred seventy-five thousand shares (175,000) of stock in said Brooklyn Mining & Milling Company, free and clear of all liens or incumbrance whatsoever; it being understood that said transfer of stock is to include all of the holdings of the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury in the Brooklyn Mining & Milling Company, and the said parties are to receive therefor the sum of three (3) cents per share for said stock; and in addition thereto Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to pay to the Brooklyn Mining & Milling Company the sum of eight thousand five hundred dollars ($8,500.00) out of the proceeds derived from the sale of the said West Brooklyn Mining Claim; in addition thereto the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey all of their right, title and interest in and to the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and said transfers shall contain the warranty that the assessment work has been done for the year 1907 upon the Empress, Midway and North Brooklyn and the said Brooklyn Mining & Milling Company shall pay the said assessment work at its reasonable value. The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury agree to do the assessment work for the year 1907, on the East and South Brookyn mining claims, and said assessment work so to be performed is to be paid for by the Brooklyn Mining & Milling Company at its reasonable value. It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury shall not be consummated on or before the first day of January, 1908, then the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey to the Brooklyn Min-

ing & Milling Company all of their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value.

It is understood by and between the parties hereto that the foregoing does not concede or admit any of the allegations contained in the pleadings of said causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties and avoiding further costs and expenses to the parties hereto.

In witness whereof, we have hereunto set our hands this 27th day of August A. D. 1907.

C. C. MILLER,
A. V. MILLER,
G. B. LASBURY,
BROOKLYN MINING & MILLING COMPANY,
By CHAS. W. PEARSALL, President.

It will be seen that this contract was in the alternative which we interpret as follows:

Differences had arisen between the mining company and some of the defendants, concerning the ownership of some of these claims, prior to the date of the contract. The contract was to settle those differences. The first alternative was: The Millers had represented to the Brooklyn Company that the United Verde Copper Company had conditionally bought the West Brooklyn claim, and there was at the time an action pending entitled *Miller vs. Brooklyn Mining & Milling Company* for services and also an action against Millers by the company to establish its ownership of the East Brooklyn, West Brooklyn and South Brooklyn claims. So it was agreed that if the sale to the Verde Company was "consummated on or before the 1st day of January, 1908,"

defendants would transfer to the Brooklyn Company 175,000 shares of stock at 3c per share, and also pay to the Company $8,500.00 "out of the proceeds derived from the sale of the said West Brooklyn mining claim" to the United Verde Company. In addition, defendants were to convey the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway claims, and do certain assessment work.

In case the sale to the United Verde was not "consummated," the other alternative was to be effective and the following was to be done:

Defendants were to convey to plaintiff all of these claims, including the West Brooklyn, and certain assessment work was to be paid by plaintiff. It was the contention of plaintiff, when the suit was brought that the sale of the West Brooklyn to the Verde Company had not been consummated and it was therefore entitled to a transfer from defendants of the West Brooklyn, and other claims.

PLEADINGS—HOW FORMED.

On February 18, 1908, plaintiff's complaint was filed, asking for specific performance, because of failure to consummate the sale to the Copper Company. (Trans. 1-10.)

Defendants answered, (trans. 10-15), and plaintiff replied, (trans. 15-28.) In this state of the record, plaintiff, on December 27, 1908, asked for a continuance, which was granted until March 1, 1909, in these terms, (trans. 44):

> "The Court, considering the motion and affidavits, orders that trial herein to be continued to March 1, 1909, and that costs of continuance be taxed to plaintiff."

On March 25, 1909, parties appeared for trial, whereupon defendants filed an amended answer and cross-complaint (trans. 10-15). On March 23, 1909, (trans. 28) plaintiff filed reply to amended answer and cross-complaint (trans. (15-28). On March 25th, the same day defendants filed their last pleading, (trans. 45), the Court ordered that the reply filed March 23, 1909, "shall be considered and treated as a reply to the amended answer and cross-complaint of the above named defendants and of Chas. C. Miller No. 2 as guardian *ad litem* of defendant, George Miller, a minor, filed herein on March 25, 1909." On March 25, 1909, (trans. 38) defendants moved to strike so much of plaintiff's reply as related to a prior judgment of the District Court of Douglas County, Nebraska, the motion also containing defendants' replication (trans. 29-38). On March 25, 1909, the motion, and the demurrer therein contained, were presented. We quote from the action of the Court thereon, (trans. 45):

"This cause came on to be heard upon the defendant's motion to strike and demurrer to plaintiff's answer to defendant's cross-complaint, and the court, having heard the argument of counsel reserves his ruling."

No direct ruling was ever made on that motion and demurrer, but the whole question considered by the Court on final submission (trans. 40-41). Act. p. 40:

"The cause was tried to the Court upon plaintiff's amended and supplemental complaint, the amended answer and cross-complaint of defendants * * * and plaintiff's reply to said amended answer and cross-complaint, together with said defendants' motion to strike, and replication addressed to said reply."

The trial Court, (trans. 41, par. 5) adjudicated the claims of the plaintiff under the Nebraska decree as follows:

"That plaintiff is not entitled to have or recover anything herein under, by virtue, or by reason, of, that certain decree described in plaintiff's reply to defendants' cross-complaint herein, rendered by the District Court of Douglas County, State of Nebraska; that the commissioner's deed made under and pursuant to said decree is void and of no force or effect and that said deed does not constitute a cloud upon the title to the 'West Brooklyn' Mining claim."

The Nebraska decree was nullified, thereby taking from plaintiff everything—every right thereby secured to it, adjudicating the issue presented by plaintiff's reply, ignoring the motion to strike and dealing with the Nebraska decree as one of the issues which the Court felt bound to determine.

The trial Court, having thus dealt with the Nebraska decree on the merits, necessarily and in legal effect, overruled the motion to strike. The reason assigned in the motion for striking the Nebraska judgment from the reply was an alleged stipulation of counsel, December 22, 1908, trans. 124-125). The trial judge had before him when the reply was filed, and the motion to strike was made, and when the decree of the Court was rendered, all that had transpired in the case. The record shows several answers filed, also that when the stipulation was made the case was for trial upon issues then made. Upon the verge of the trial, March 25, 1909, the defendants saw fit to file still another amended answer, presenting new and additional issues, and the Court's action in not striking the reply will be presumed to have been based upon sufficient considerations. The answers on file when the stipulation was made, did not assert ownership of the West Brooklyn

in defendants, nor seek to quiet their title thereto. An answer subsequently filed, as well as the one filed still later on, to-wit: on March 25, 1909, (trans. 14, pars. 2 and 3 of the answer) presented the additional issue "that cross-complainants above named are the owners, entitled to the possession and in the possession" of the West Brooklyn, and that the Brooklyn Company "makes some claims to said mining claim adverse to these cross-complainants." The prayer of these answers, different from all others, asks that cross-complainants' estate in said mining claim be established, and that the Brooklyn Company "be forever barred and estopped from having or claiming any right or title to said premises adverse to said cross-complainants." In its reply to the first of these answers plaintiff, for the first time, brought the Nebraska judgment into the case. At the time the stipulation for continuance was entered into, defendants' answer asserted no claim of absolute ownership of the West Brooklyn mine, and asked for no affirmative relief. The amended answer filed after the continuance was, in substance, a suit by defendants against plaintiff, in the pending suit, based on defendants' alleged absolute ownership of the West Brooklyn, and seeking a decree against plaintiff quieting their title thereto. It was for the plaintiff then to plead to the suit within the suit. We never agreed not to plead to this new suit. The stipulation was entered into, with reference to, and in view of the issues then formed for trial, and consequently should not bind plaintiff upon a new cause of action thereafter presented, not in the contemplation of either party when the stipulation was made.

SYNOPSIS OF THE DECREE OF TRIAL COURT.

The Arizona case was tried on the foregoing pleadings and state of facts and the Court rendered its decision, (38-39, trans.) holding the contract binding between the parties, yet denying the relief sought, (trans. 40-41) and gave the defendants an opportunity to make a contract of a sale of the West Brooklyn to the United Verde Company, the decree being in the alternative, as follows:

"1. That within thirty days (30) from the date hereof plaintiff shall file its written consent that this decree conditional upon *a sale* of the 'West Brooklyn' Mining claim to the United Verde Copper Company, as hereinafter provided shall become final, irrevocable and non-appealable, and consenting that said defendants, within the time hereinafter stated, may make a *sale* or *binding contract* therefor, of the 'West Brooklyn Mining claim to the United Verde Copper Company, free and clear of all claims and litigation on the part of plaintiff," etc.

This decree provides for "a" sale, not "the" sale mentioned in the contract.

2. That if plaintiff fails or refuses to file said consent and waiver within thirty (30) days, its action herein shall stand dismissed.

3. If within ninety (90) days from the date thereof, defendants shall consummate or make *a binding contract* for the sale of the West Brooklyn to the United Verde Company, and pay over, or tender to plaintiff the money, stocks, deed and proof of assessment work, as provided in the contract of August 27, 1907, then the decree will "forthwith become final, irrevocable, and non-appealable," and "plaintiff shall be *forever barred and*

estopped to claim any *right*, title or interest in or to said West 'Brooklyn Mining' Claim."

4. If plaintiff within the period aforesaid shall file its written consent and waiver, as above provided, and defendants have failed to make such sale or binding contract to the United Verde Copper Company and to pay over and deliver or tender the money, etc., within said period of ninety (90) days, then defendants shall forthwith execute and deliver to plaintiff a valid and sufficient deed conveying to plaintiff the West Brooklyn claim as mentioned in the agreement of August 27, 1907, and said agreement to be fully carried out by all the parties to this decree.

5. That the plaintiff is not entitled to have or recover anything under or by virtue or by reason of the certain decree described in plaintiff's reply to defendants' cross-complaint rendered by the District Court of Douglas County, State of Nebraska; that the commissioner's deed, made under and pursuant to said decree is void and of no force and effect and that said deed does not constitute a cloud upon the title to the West Brooklyn Mining claim.

6. That plaintiff is not in any event entitled to an accounting herein.

On appeal to the Supreme Court of Arizona, that Court, April 2, 1910, modified and affirmed the decree of the trial court. (trans. 126-135). Application for appeal was made from the Supreme Court of Arizona to this Court, and the Territorial Supreme Court made special findings. (Trans. 147-155).

ASSIGNMENTS OF ERRORS. (TRANS. 142.)

1.

The Supreme Court of the Territory of Arizona

erred in modifying the decree of the trial court, and in affirming the same as so modified.

2.

The Court erred in holding the complaint of appellant should be dismissed for want of equity.

3.

The Court erred in holding that appellant had no right to compel specific performance of the contract declared on, and that it was itself at fault in not dismissing its suit No. 4541 before January 1, 1908, and that it thus prevented appellees from consummating a sale of the West Brooklyn Mining claim to the United Verde Copper Company prior to that date; for the reason that the findings and special verdict of the Court show that said suit was instituted by Chas. W. Pearsall in behalf of himself and other stockholders of appellant, against the Millers and Lasbury, and the Company in December 1906, for the purpose of having it declared that they, the Millers and Lasbury, held the legal title to the West Brooklyn, East Brooklyn and South Brooklyn Mining Claims in trust for appellant, and to require them to convey said claims to the Company. At this time the Millers and Lasbury were in control of the Company, and this complaint was what is termed a minority stockholders' action to protect the rights of the Company. In July 1907 Pearsall and other stockholders having, at an election of the stockholders of the Company, acquired control of the Board of Directors of the Company, filed an amended complaint in this action No. 4541 naming the appellant as plaintiff against the Millers and Lasbury as defendants. C. C. Miller in May 1907, brought an action for $5,000.00 against the Company. For the purpose of disposing of and compromising this litigation the contract sued on by appellant was entered into. This contract was entered into "in consideration of the dismissal and settlement of the said causes of action." This contract was a reciprocal contract, binding on both parties, and from the date of its execution, August 27, 1907, both of said causes of action were extinguished and dismissed and it was error in the Court not to so hold.

It was manifest error in the Court to hold that be-

cause formal dismissal of said action in open Court was not made until February 15, 1908, that a consummation of a sale of the West Brooklyn claim to the United Verde Copper Company was thereby prevented, for the reason that if said fact had existed appellees could have applied to the Court in said action for a formal dismissal of same and an exhibition of said contract would have secured such relief, if such fact existed.

4.

It was manifest error for the Court to affirm the judgment and decree of the lower Court and dismiss appellant's complaint for the reason that the Court finds that no sale of the West Brooklyn was consummated prior to January 1, 1908, by appellees to the party mentioned in the contract, and the effect of said judgment is to take appellant's property and give it to appellees without any remedy on the part of appellant ever to recover same or the value thereof.

5.

It was manifest error in the Court to hold "in September 1906, Miller and Lasbury gave an option to the United Verde Copper Company for the purchase of the West Brooklyn and White Rock claims (the latter does not figure in this suit) for twenty thousand dollars. The term of this option does not definitely appear, but it was extended at different times and kept in force up to January 1, 1908"; for the reason that the option is set out at length in the record as Appellant's Exhibit "O", and is the only option given, and the same was extended to January 1, 1908, verbally, and the testimony of Miller and Clark (the latter representing the United Verde Copper Company) shows conclusively that Miller would not sell the West Brooklyn alone for $10,000.00 unless Clark purchased for the United Verde Copper Company the White Rock claim (which was the property of the Millers) for a like sum of $10,000.00 prior to January 1, 1908. C. C. Miller says: "The West Brooklyn was never referred to as a single claim. When they bought, they bought both claims; when they pay for it, they pay for both claims." Clark says a deed for West Brooklyn and White Rock at $20,000.00 for the two claims was sent him by the attor-

neys prior to January 1, 1908, and he declined same; that "prior to January 1, 1908, the matter was in the hands of the attorneys" and it was not until the spring of 1908 that the purchase of the West Brooklyn as a single claim at $10,000.00 was talked of. It is further fully shown that appellees never claimed to have been prevented by the failure of appellant to formally dismiss its suit from making such sale until they filed their amended answer and cross-complaint February 8, 1909, and again on March 25, 1909. The facts and findings show that on January 2, 1908, consummation of the sale of the West Brooklyn was claimed and a tender of the performance of the obligations of the appellees under the agreement of August 27, 1907, was made. Appellant declined the tender (as the Court finds) on the ground that it did not fully comply with the terms of the agreement. No claim was made then that they had been prevented from selling to the United Verde by the failure upon the part of the appellant to dismiss suit No. 4541. The tender did not comply with the terms of said contract for the reason that no sale had been consummated and the Court so found, and the judgment and decree was erroneous and should have been in favor of appellant.

6.

It was manifest error for the Court to hold that appellant was entitled to no rights by virtue of the Nebraska judgment, for the reason that the same is a personal judgment in favor of appellant against George B. Lasbury and Ada M. Miller adjudicating the rights of the respective parties under said contract, and, as such judgment of a sister state, was entitled to full faith and credit.

7.

It was manifest error for the Court to hold that appellant could not plead the Nebraska judgment by reason of a stipulation regarding a continuance granted in December 1908, for the reason that at such time the state of the pleadings showed that appellees did not claim any title to the West Brooklyn and the other claims mentioned in the contract, but had theretofore tendered per-

formance and if performance had not been made they were to convey to appellant, and if it had been made they were to convey the other claims mentioned in the contract to appellant and pay the consideration mentioned in the contract, received for West Brooklyn, to appellant; and said judgment was pleaded only to the answer and cross-complaint filed in March 1909.

8.

It was error for the Court to hold that the making of such stipulation regarding a continuance granted in December 1908, for the reason that at such time the state of the pleadings showed that the pleadings at that time.

(This is a mistake and will be pointed out later,, p. 64 of this brief.)

9.

It was manifest error for the Court not to consider the Nebraska judgment, notwithstanding the state of the pleadings, since that judgment whether pleaded or not was conclusive as between appellant and Ada M. Miller and the interests of George B. Lasbury, as to the facts:

(1) That appellant had performed all the obligations required by the contract to be by it performed;

(2) That no sale of the West Brooklyn had been consummated between appellees or any of them, or the said George B. Lasbury and the United Verde Copper Company prior to January 1, 1908, and

(3) That the failure to dismiss the suit No. 4541 did not interfere with, hinder or prevent the consummation of such sale: such finding and determination precluding further investigation of those facts as between appellant and Ada M. Miller and George B. Lasbury, and it was manifest error for the Supreme Court to find otherwise on evidence offered on the trial of the case in Arizona (where the same questions were material to the issue) notwithstanding the stipulation, and notwithstanding that the judgment of the Nebraska Court might not have been pleaded as an estoppel or *res adjudicata,* said judgment of the Nebraska Court having been properly admitted in evidence upon the trial though improperly pleaded or not pleaded at all.

Two of the issues to be tried in the Arizona Court

were whether appellant had performed all of its obligations under the contract in suit, and whether appellant had prevented consummation of the sale of the West Brooklyn Mining claim of the United Verde Copper Company. These were issues of fact in the Nebraska suit. In the Nebraska suit those issues were litigated, found and adjudicated in favor of appellant. These same facts being in issue under the pleadings in Arizona, were, under general denial, susceptible of proof by the record of the Nebraska judgment insofar as the same affected the interest represented in the Nebraska suit by or through Ada M. Miller and George B. Lasbury.

The record of the judgment in the Nebraska suit, being admissable in evidence, without being specially pleaded, was, as an evidential fact, conclusive of the matters put in issue and actually determined by the Nebraska judgment.

10.

The judgment and decree of the Court is contrary to law and equity.

11.

The judgment of affirmance dismissing appellant's complaint is contrary to equity in this—that appellant from the time of making the contract abandoned its cause of action against appellees and has dismissed the same. The consideration of said contract concludes appellant from any remedy; it loses all of its property, and the decision of the Court, in effect, gives it all to appellees.

12.

The judgment of the Court is contrary to the facts in the case as found by the Court, in this—that the Court finds that appellees have the legal title to the West Brooklyn and other claims mentioned in the contract, and that the basis of appellant's title is the contract sought to be enforced by appellant, and a dismissal of the complaint leaves appellant entirely remediless—stripped of all its property and the same given to appellees.

The assignments of errors are set out at length on pp. 142-145 of the transcript and will be discussed under

points showing in what the decree and judgment is erroneous.

BRIEF OF ARGUMENT.

The Exact Issues.

Complaint. * * It is important to know what the precise questions for decision were. The complaint (trans. 1-9) sets out, (second paragraph, trans. 2), the contract in suit, which provided, among other things, (trans. 3) "if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by said Charles C. Miller, Alonzo B. Miller and George B. Lasbury shall not be consummated on or before the first day of January 1908, then the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey to the Brooklyn Mining and Milling Company all their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims." Paragraph three (trans. 4); that Miller and others represented to the plaintiffs that they had an outstanding contract with the Copper Company, giving that Company an option, in writing, to purchase the West Brooklyn claim; that plaintiff denied the right of Miller and others to sell this claim, and that they had any title thereto. Paragraph four, (trans. 5); that the sale to the Copper Company by Miller and others had not been consummated prior to January 1, 1908, and because of no sale, so much of the contract sued on as did not relate to the transfer of the West Brooklyn claim to the plaintiff became obsolete. Paragraph five, (trans. 5); that the portion of the contract sought to be enforced was the latter part commencing with the words "it is further stipulated" (trans. 3) and ending with the close of the

contract. Par. seven, (trans. 6); that the suits referred to in the contract had been dismissed and alleging performance of its other provisions by plaintiff and claiming a right in the plaintiff to receive a conveyance of six mining claims, including the West Brooklyn, and offering to pay the assessment work mentioned in the contract, and further tendering the performance of all covenants on its part to be performed. Paragraph ten, being allegations and prayer with reference to an accounting, (trans. 7) was dismissed out of the complaint without prejudice (trans. 45-46). Paragraph eleven, (trans. 8); by reason of the failure to consummate the sale of the West Brooklyn the plaintiff was entitled to a deed of conveyance, conveying to the plaintiff said six claims. Then follows the prayer for specific performance.

Answer & Cross Complaint. * * * Omitting, at this point, any reference to intermediate pleadings, we call attention to the answer upon which the trial was had, to focus the exact points in issue. The defendants filed pleadings, (trans. 10-14), entitled 'Amended answer and cross-complaint.' In paragraph one: that the defendants before January 1, 1908, dismissed suit brought by them mentioned in the contract, and demanded of plaintiff a like dismissal of suits, which was refused; that on January 2, 1908, (January 1 being a legal holiday) defendants tendered to plaintiff 175,000 shares of stock, $3,150, and an offer of a sufficient deed from Charles C. Miller, Alonzo V. Miller and George B. Lasbury, transferring to plaintiff all of the mining claims except the West Brooklyn, " said deed having been so executed and acknowledged by Alonzo V. Miller prior to his death and delivered by him for the purpose of complying with said agreement of August 27, 1907," also an affidavit showing the assess-

ment work. This tender is followed by the specific allegation, (trans. 11, par. 2): "That *such* tender was in *full compliance* with *all* of the *requirements* of said agreement of August 27, 1907"; that the tender so made had been renewed and refused, (trans. 12); admit the death of Alonzo V. Miller, intestate, in Arizona, in December, 1907, leaving certain heirs surviving; admit and *aver* that on August 27, 1907, Charles C. Miller and Alonzo V. Miller were *owners* of interests in said six mining claims, admit litigation referred to in the contract, and the execution of the contract; admit that Copper Company held a contract for the purchase of the West Brooklyn claim and deny all other allegations. Further answering, (trans. 12-13): defendants *deny default on their part* in carrying out the contract; admit that they *refused to convey* the West Brooklyn to plaintiff; deny refusing to convey the other five mining claims, or either of them, *or that they refused to perform* the contract; allege readiness at all times to *fully perform* and that frequent *tenders* of *performance* had been made, which were always refused; "that the failure of defendants to have *fully* and *completely transferred and delivered* said West Brooklyn Mining claim to the United Verde Copper Company, *and to have received all of the money in payment therefor* on or before January 1, 1908, was caused solely by plaintiffs' failure and refusal to perform its part of the contract, dated August 27, 1907, *by dismissing its suit* pending at the time said contract was entered into." *Deny plaintiff's performance of contract;* dismissal of a previous suit, and other unimportant matters. Further answering said complaint(trans. 14) by the way of cross-complaint, defendants *aver ownership in them,* and right of possession, of the West Brooklyn claim, alleging that complainant *claims some interest adverse to cross-complainants* and

praying for judgment establishing cross-complainants' estate in the West Brooklyn Mining claim, and *asking that complainant be barred from any claim therein.*

Reply. * * * The reply (trans. 15-17), denied all allegations of amended answer and cross complaint not previously admitted, and set up the *Nebraska* suit, proceedings and judgment. (Exhibit "A," trans. 18-28).

POINT 1.

Under the issues presented, and the findings of both lower Courts that no sale had been consummated of the West Brooklyn Claim to the United Verde Copper Company by defendants prior to January 1, 1908, the plaintiff was entitled to specific performance of the contract in suit, without regard to whether it prevented such consummation or not.

(Assignments of error No. 1, 2, 3, 4, 5, and 10.)

These pleadings boiled down to the real import mean:

1. Plaintiff alleges performance of all conditions in the contract by it to be performed; and denies consummation of sale.

2. Defendants deny these allegations.

3. Defendants allege complete performance of the conditions of the contract by them to be performed.

4. Defendants allege tender, which tender they claim to have been in full compliance of their obligations under the contract.

5. Defendants were not in default in carrying out their obligations in the contract.

6. The failure of defendants "*to have fully and completely transferred and delivered* said West Brooklyn Mining claim to the United Verde Copper Company and *to have received all of the money in payment therefor* on or before January 1, 1908, was caused solely by plaintiff's failure and refusal" to dismiss its suit. (The only thing prevented by plaintiff was "transfer," "delivery" and "receive all of the money,"—not that it prevented

full compliance by defendants which they say they performed, but limited the prevention of compliance by defendant merely to transfer, delivery and collection.)

This was not sufficient to permit evidence by defendants that they had *fully* performed, but merely that they had not been able to *transfer, deliver* and *collect.*

Philip Schneider Brewing Co., v. American Ice Machine Co. (8 C. C. App.), 77 Fed., 138, 142-4.

We quote from that case, page 143:

"In answer to the general averment in the complaint that the 'plaintiff has fully complied with and performed all and singular the terms and conditions' of the contract on its part, the answer 'denies that the plaintiff has fully complied with and performed all and singular the terms and conditions of said contract.' This denial is clearly a negative pregnant, and raised no issue. *James v. McPhee,* 9 Colo. 491, 13 Pac. 535; Bliss Code Pl.. Sec. 332. This denial would be literaly true if the plaintiff had failed to perform the contract in some trivial or immaterial respect, whereas a substantial compliance with the contract would entitle the plaintiff to recover; and this denial does not negative the fact that there was such a compliance. But we do not rest our decision upon this ground. It may be assumed that this clause of the answer, standing alone, was a good general denial, and that, if the defendant had said nothing more in its answer, it would have raised an issue as to the sufficiency of every part of the plant. But the defendant was not content to rest on this general denial. It afterwards chose to make its denial specific, and to point out with great particularity the parts of the ice machine which it claimed were defective. The dubious general denial is followed up by this averment: 'Defendant alleges that the plaintiff failed and neglected to perform the contract in the complaint set forth, accord-

ing to the terms thereof, in the following particulars.' Here follows a particular specification of the part of the machine alleged to be defective which we have set out in full in the statement. The counterclaim set up in the defendant's answer is based on the same alleged defects in particular parts of the machine. Neither in the specific denials nor the statement of the counterclaim is there any mention of the engine or compressor, or any hint or suggestion that either was defective. Under this state of the pleadings, the plaintiff was not required to move for a more specific statement, or a bill of particulars. If such a motion had been made, it must have been overruled upon the ground that the defendant had stated with great particularity the parts of the machine which it claimed to be defective. The plaintiff had a right to rely upon this specification of defects. By reference to the contract it will be seen that the manufacture of ice requires an extensive and elaborate machine, composed of numerous parts. The defendant had been operating the machine for some time before it filed its answer. It had knowledge, therefore, of all its defects, large and small; and when it undertook to particularly specify them the presumption is that it specified them all, and the plaintiff had a right to rely upon this presumption."

Particularly calling attention to the quotation above, on page 143, as follows:

> "Neither in the specific denials nor in the statement of the counterclaim is there any mention of the engine or compressor, or any hint or suggestion that either was defective,"

permit us to say that neither in the specific denials nor in the statement of how the defendants were prevented from performing all their duties, is any mention of preventing a *sale* to the Copper Company, by any of plain-

tiff's conduct. Had plaintiff moved for a more particular statement of the manner in which plaintiff prevented consummation, it must have been overrruled because the defendants had stated "with great particularity" wherein they had been obstructed by the acts of the plaintiff. The defendants had full knowledge of what they had done with reference to a consummation of the sale and what acts of plaintiff had taken place and what those acts prevented defendants from doing; and when they "undertook to particularly specify them, the presumption is that they specified them all, and the plaintiff had a right to rely upon this presumption."

At page 144 it is said:

> "The plaintiff was thus advised, as was its right, of the precise issues it had to meet. It was not required to come prepared to meet any others. In this state of the pleadings it would be a great hardship on the plaintiff to require it to meet charges or defects in other parts of the machine, made for the first time at the trial."

In the above case, at page 145, the Court quoted from *Kahnweiler v. Insurance Company*, (8 C. C. A.), 67 Fed., 483, as follows:

> "If the defendant intended to rely upon the nonperformance by the plaintiffs of one or more of the numerous conditions of the policy, it should have pointed them out specifically, and alleged their breach. In no other way could it be known to the parties or the court what issues were to be tried. Under the Code, when a defendant relies upon a breach of a condition precedent in a contract as an excuse for not performing the contract on his part, he must set out specifically the condition and the breach, so that the plaintiff and the court will be advised of the issue to be tried. Bliss Code Pl. (3d Ed.) Sec. 356a; Nash Pl, pp.

300, 302, 782. In the case of *Preston v. Roberts*, 12 Bush, 570, 583, the Court of Appeals of Kentucky said: 'The plaintiff being expressly authorized to plead in that manner (general performance of conditions precedent), the defendant must, if he relies upon the fact that any of the conditions precedent has not been performed, specify the particulars in which the plaintiff has failed (Newm. Pl. & Prac. 510, 511; *Railroad Co. v. Leavell*, 16 B. Mon. 362), thus confining the issue to be tried to such particular condition or conditions precedent as the defendant may indicate as unperformed.' See, to the same effect, *Gridler v. Bank*, 12 Bush. 333. The cases of *Hamilton v. Insurance Co.* 136 U. S., 242, 10 Sup. Ct., 945, and *Hamilton v. Insurance Co.* 137 U. S., 370, 11 Sup. Ct. 133 arose in a code state, and in these cases the defendant set up the condition precedent relied upon as a defense, and specifically alleged its breach, and this is believed to be the uniform practice in all code states. It is also the practice in England, under a statute which, like our codes, permits a general averment of the performance of conditions precedent by the plaintiff. Under that statute, where such a general averment is made in the declaration, any condition precedent, the performance or occurrence of which is to be contested, must be distinctly specified, and its performance negatived in the defendant's answer."

The answer of defendants presented no issue that a sale of the West Brooklyn had been prevented by plaintiff.

Pleadings are to be construed against the pleader.

We pass by the admission that the plaintiff failed of its duty "by dismissing its suit," as it is apparent the pleader intended to say " by not dismissing its suit." Be that as it may. An examination of the whole of defendants' pleadings shows deliberation in the choice of

words and that defendants were endeavoring to hold to two positions—inconsistent in themselves. First:—They had fully performed all that the contract required of them by a tender which they alleged was " in full compliance with all the requirements of said agreements." (Trans. 11). Second:—Plaintiff had prevented the *transfer and delivery* of the West Brooklyn to the Copper Company and also prevented them from collecting "*all* of the money in payment thereof." (Trans. 13). This is accented by the testimony of C. C. Miller when he attempts to expand into a part payment, a loan made to him, (not to all the defendants) by the Copper Company, of $2,000.00 for which the Copper Company took a due bill, and later deducted it from the purchase price of silica supplied under the lease heretofore mentioned, (trans. 93-96).

The pleadings are strained and inharmonious, and the testimony adduced by defendants is forced and misapplied. The whole makes a jumbled effort, resulting in confusion.

The contract is construed by them so as to permit them to dismiss their suit so late as January 2, 1908, but in a way that plaintiff must dismiss its suit at a time (not mentioned) which would permit them to make a new contract of sale of the West Brooklyn alone, for $10,000.00 before January 1, 1908. They then offer pleadings which may be construed as pleading full compliance in one breath and prevention of compliance in the next.

If a dismissal of their suit on January 2, 1908, was deemed a compliance with their agreement, why was it not sufficient for the plaintiff? If sufficient for the plaintiff, how did it prevent, under the pleadings, a consummation of the sale?

In this connection it is interesting to note that the tender of $3,150.00 made in open Court on January 2,

1908, was the money of Miller, and it was at that time the demand was made upon plaintiff to dismiss its suit. If a dismissal at that time would be a compliance with plaintiff's duties under the contract how did a failure to dismiss prevent a sale, when Mr. Clark, the manager of the Copper Company was absent from home for a week or more until the morning of January 2, 1908, (trans. 114)? Defendants were forcing the whole defense in order to secure for themselves the values in the West Brooklyn.

It is obvious that defendants were seeking the "whip-hand" over both the Copper Company and the plaintiff, by both pleadings and proofs.

Both Arizona Courts found (trans. 130): "that the sale of the West Brooklyn to the United Verde by the defendants had not in fact been consummated on or before January 1, 1908, but that the failure to consummate such sale was because of the failure and refusal of the plaintiff to dismiss the action."

The latter part of this finding is not within any issue presented for determination. The only thing the defendants claim for the pending suits was, as shown in their answer (Trans. 13), "that the failure of the defendants to have *fully and completely transferred and delivered* said West Brooklyn Mining Claim *and to have received all of the money in payment therefor* on or before January 1, 1908, was caused solely by plaintiff's failure and refusal to perform its part of the contract dated August 27, 1907, by *dismissing its suit,*" etc. That is not equivalent to an allegation that the plaintiff prevented the consummation of the sale. *A full and complete transfer and delivery* and the *collection of the consideration money therefor* is no part of the sale itself.

In the same breath that defendants demand dismissal of plaintiff's suit, defendants were claiming a consummation of the sale to the Copper Company, so the Su-

preme Court says, quoting from findings (Trans. 149, last paragraph):

> "On January 2, 1908, the case of Miller against the Brooklyn Company, No. 4608, was dismissed. On the *same date* defendants filed in action No. 4541 their written motion to dismiss said action. *Consummation* of the sale of the West Brooklyn to the United Verde Company *was claimed*, and a tender of performance of the obligation of the Millers and Lasbury under the agreement of August 27, 1907, was made."

According to this finding of the court, Millers were taking the position, on January 2, 1908, that the sale had been, in fact, consummated, and, later, that plaintiff prevented that very thing. On January 2, 1908, defendants planted their right to demand of plaintiff a performance of the contract, acceptable and desirable to them, upon the express ground of "consummation."

In their pleadings they still undertook to hold that position, and, at the same time, to avoid glaring inconsistency, undertook to mask another, but different, issue by alleging a prevention by plaintiff of a transfer and delivery, etc., to the Copper Company of the West Brooklyn.

Their position always was "consummation" until Lasbury and Mrs. Miller were routed therefrom in the Nebraska court. Whether we interpret defendants' pleadings by rules of law or their understanding of them, we reach the same conclusion. Illustrative of this point see the Nebraska answer (Trans. 25). In paragraph three (3) of the answer signed by Hall and Stout, attorneys for Ada M. Miller and George B. Lasbury, this language is found:

> "Said answering defendants further say that each, every, and all conditions in said contract to be performed by said C. C. Miller, A. V. Miller and

G. B. Lasbury, by them were performed within the time specified therein, *and these answering defendants allege the fact to be that the sale of said property mentioned in said contract to be made to the United Verde Copper Company was fully consummated within the time therein specified and the property therein mentioned duly and properly conveyed to said United Verde Copper Company,"* etc.

The term "sale" has a fixed and well defined meaning, both in law and equity. "It means a contract between parties to take and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold." (*Williamson vs. Berry,* 49 U. S. (8 Howard) 495, Syl. 13, 544.) The contract in suit provided that, whereas the defendants "have made a *conditional* sale," (Tr. 2) and "if the sale of the West Brooklyn mining claim to the said United Verde Copper Company is consummated on or before January 1, 1908," certain things are required. (Tr. 3.)

Further, "if for any reason the sale * * * shall not be consummated" the defendants are to deed to the plaintiff the West Brooklyn.

Taking the words "conditional sale" in connection with the word "consummated" as used with reference to the whole context, it would seem plain the effect is that, if the "conditional sale" shall become absolute, the West Brooklyn is to go to the Copper Company; otherwise, to plaintiff. It was not with the purpose of modifying the fixed and well defined meaning of the word "sale" that the word "consummation" was used, but to provide if a conditional sale became a sale absolute—"a contract between the parties to take and pass rights of property for money which the buyer * * * promises to pay to the seller for the thing bought and sold"—the West Brooklyn would not be deeded to plaintiff.

> "A sale is a contract for the transfer of property from one person to another for a valuable consideration, and these things are requisite for its validity, viz: the thing sold, which is the object of the contract, the price, and consent of the contracting parties."

2 Kent Com. 468.

Micks et al. vs. Stevenson, (Ind.) 51 N. E. 492, 493.

In the case just cited a written contract was entered into between one Stevenson and one Micks and others, wherein Stevenson agreed to negotiate a sale of property, and this language is used, p. 492, col. 2:

> "It is agreed that, upon the consummation of said sale at a sum first to be approved and accepted by the parties of the second part, that the said parties of the second part shall pay to said party of the first part the sum of $1,000."

A contract for a sale was entered into between an Electric Company and Micks, as first parties, and one Collins, as second party. By the provisions of the contract Collins was to pay $2,000 cash, $8,000 December 15, 1896, and further payments of stated amounts at stated times, and he was to assume some existing indebtedness. That the property sold to Collins was not to be transferred until the $8,000 due December 15, 1896, was paid. After that contract was executed Stevenson sued for his $1,000, claiming that it was due him because of the "consummation of said sale." Micks defended against that suit because "no sale was consummated under the contract." The Indiana court held (syl.):

> "That the sale was 'consummated' so as to entitle the agent to commissions for affecting it, although the conditions were never complied with."

Had the Millers and the Copper Company entered

into a contract for the sale of the West Brooklyn and had fixed the terms of sale and the times of the payment of the money at such times as these suits could be dismissed, or at such time as the Millers could furnish a good title because of the death of Alonzo V. Miller, that would have constituted a sale.

Beardsley vs. Beardsley, 138 U. S. 262.

In that case Mr. Justice Brewer said (Syl.):

"The appellants signed and delivered to the appellee a paper in which he said, 'I hold of the stock of the Washington and Hope Railway Company, $33,250, or 1,350 shares, which is sold to Paul F. Beardsley (the appellee) and which, though standing in my name, belongs to him, subject to a payment of $8,000, with interest at same rate and from same date as interest on my purchase of Mr. Alderman's stock.' *Held,* that this was an executed contract by which the ownership of the stock passed to the appellee, with a reservation of title simply as security for the purchase money."

The pleadings of the defendants are uncertain as to which of their theories is relied upon.

"A pleading should be construed with reference to the general theory upon which it proceeds; and a pleading should not be uncertain as to which of two or more theories is relied upon."

Phillips, Code Pl. Sec. 354. *First Nat. Bank vs. Root,* 107 Ind. 224, 8 N. E. 105. One will not be allowed to plead inconsistent defenses."

Keenan vs. Sic (Neb.) 135 N. W. 841, 843, Col. 2.

Columbia Nat. Bank vs. Ger. Nat. Bank (Neb.), 77 N. W. 346, Syl. 6.

POINT 2.

Appellant (Plaintiff) was guilty of no default, under the terms of the contract set up in its complaint, which would warrant the lower Courts in refusing it a decree by way of specific performance ordering a conveyance to it of the West Brooklyn and other Mining Claims mentioned in its complaint, and the refusal of such relief and the dismissal of Plaintiff's (Appellants) complaint was reversible error. (Assignments of error 1, 2, 3, 4, and 10).

The fact that the West Brooklyn was not sold entitled the appellant to an enforcement of the alternative portion of the contract to the conveyance of the West Brooklyn and other claims, unless appellant did something to prevent a consummation of the sale to the Verde Company. Both lower courts based refusal to enforce, upon the sole ground that appellant had not dismissed its suit against some of the defendants (appellees), mentioned in the contract, prior to January 1, 1908. We submit that this is no sufficient reason because:

(A.) THE FORMAL DISMISSAL OF THE COMPLAINT IN THE CASE REFERRED TO IN THE CONTRACT, THE CASE OF THE BROOKLYN COMPANY VS. MILLER, ET AL, WAS NOT A CONDITION PRECEDENT TO BE PERFORMED BEFORE THE CONSUMMATION OF A SALE OF THE "WEST BROOKLYN" CLAIM TO THE UNITED VERDE. IF IT IS TO BE MAINTAINED THAT THE CONTRACT ITSELF DID NOT OPERATE TO DISMISS THE CASE, APPELLANT COULD FORMALLY DISMISS AT ANY TIME BEFORE DECREE FOR SPECIFIC ENFORCEMENT.

The only condition precedent in the contract relates to the consummation of the sale on or before January 1, 1908, to the United Verde, of the "West Brooklyn," all others being such as could be performed at any time before decree.

Time was not of the essence of the covenants to dismiss the suits, but was of the essence, as to the consummation of the sale to the United Verde. No time was fixed for dismissals.

The practical construction placed upon the contract as to the dismissal of suits, by defendants, was that the suits were not a hindrance, but could be dismissed as late as the last minute in the day of January 2, 1908, which defendants did. We submit, as a matter of law, that the pending suit in Arizona, Brooklyn Company vs. Miller, et al, was not a legal obstruction, because the contract sued upon made no such provision. If a sale, i. e. a binding contract, had been made, the contract in suit, if placed upon record, would constitute a link in the title of the Copper Company and a fortification of its title, instead of clouding it.

Where time is not of the essence, the failure of a party to perform a condition will not defeat specific enforcement.

> "It is now thoroughly established that the intention of the parties must govern; and if the intention clearly and unequivocally appears from the contract, by means of some express stipulation, that time shall be essential, the time of completion or performance or of complying with the terms, will be regarded as essential in equity as much as at law."

Pom. Con. p. 462, sec. 390.

Whiteman vs. Perkins, 56 Neb. 181, 185.

If time be not of the essence of a portion of the contract, performance of such things as are not controlled by time, may be at any time before decree.

Seaver vs. Hall, 50 Neb. 878, 882, and Syl. 3.

King vs. Gsantner, 23 Neb. 797. (Storey Eq. Jur.) 777.

Defendants could put plaintiff in default only by tendering performance themselves. This they never did, although claimed by them. In that connection we find the following *finding of fact* by the Territorial Supreme Court (Trans. 149, last paragraph):

> "On January 2, 1908, the case of Miller against the Brooklyn Company, No. 4608, was dismissed. On the same date defendants filed in action No. 4541 their written motion to dismiss said action. *Consummation* of the sale of the West Brooklyn to the United Verde company *was claimed* and a tender of performance of the obligation of the Millers and Lasbury, under the agreement of August 27, 1907, was made. This tender was refused by counsel for the appellant on the ground that it did not fully comply with the terms of the agreement, and counsel again declined to dismiss the suit, No. 4541."

The opinion handed down by the Supreme Court (Trans. 126-134) states the facts as viewed by the two Arizona courts. The opinion of the trial judge is found in the transcript, pages 38, 39. We quote what may be termed the gist of this controversy:

> "It is axiomatic that before either party to a contract may obtain specific performance against the other he must show that he has, in good faith, done all that the contract requires of him, or has offered, in good faith, to do all that the contract requires of him. It is shown by the evidence and clearly appears therefrom that no sale was consummated by the defendants with the United Verde Copper Company of the West Brooklyn mining claim on or before January 1, 1908. *On the face of the record, therefore, it appears that the defendants have failed to carry out one of the terms of the agreement.* It becomes necessary, therefore, to determine whether the plaintiff is in a position to enforce,

> as against the defendants, *the performance of the conditions named in the agreement, and which, by its terms were to be performed by the defendants in the event* such sale should not have been made on or before the date mentioned. * * * The agreement was a complete settlement between the parties of all antecedent disputes and claims, and it cannot be inferred from the agreement that the pending suits were to be continued, for the agreement is absolute that they should be dismissed." (Trans. 38.)

So, as a matter of fact and law, the plaintiff was entitled, on the face of the record, to a decree for specific performance unless (within the issues) there was some good reason for denying it. That the agreement "was a complete settlement between the parties of all antecedent disputes" and the pending suits were to be dismissed without any further consideration, cannot be questioned "for the agreement is absolute that they should be dismissed." There was no time fixed for the dismissal, and we contend that, even though they should have been dismissed, as a matter of legal right, as to all parties, as soon as the contract was executed, all of the arguments of law and all of the reasoning based upon a failure to dismiss, on or before January 1st, 1908, beg the question; because even though the legal right may have been, and probably was, given either party to go into court and enforce a dismissal, time was not of the essence of these covenants. These were rights based upon a provision of the contract which did not inhere in that portion of the contract of which time was the essence, and they were separately enforceable. To illustrate: Had the Copper Company entered into a valid contract for purchase, within the provisions of their option, which included the West Brooklyn, and had ignored these suits and

withheld payment for the purchase, it would not have affected the right of either party to thereafter compel a dismissal, and would not have embarrassed the legal right of the Copper Company to have a deed to the property. The contract created a vested right for the dismissal of all of the law suits referred to, and time not being of the essence as to dismissal, is of no importance in determining the question "whether the plaintiff was in a position to enforce, as against the defendants, the performance of the conditions named in the agreement." The contract in no way ties dismissal with the sale of the West Brooklyn. The contracting parties were satisfied to rest their claims for dismissal upon their legal rights to compel the same under the agreement to dismiss, whereas, the duty to convey, to plaintiff, the West Brooklyn, rested upon no such right but upon some happening at a given time.

Referring further to the decision of the Court (Trans. 38, 39), it says it appears that certain suits were pending at the time the agreement was made which involved the West Brooklyn title; that such suit was not dismissed until February 15, 1908; that prior to January 1, 1908, defendants were endeavoring to effect a sale of the claim to the Copper Company, and the Court further says: By the testimony of Will L. Clark it is shown that the pending suit prevented such sale, and that by the testimony of the same witness Clark, the Copper Company had ever since been willing to make the purchase at $10,000. Then the Court says (Trans. 39, par. 1): "I *therefore* conclude that the plaintiff is not in a position to enforce, at this time, specific performance on the part of the defendants *for the reason that it was in itself at fault in not dismissing its litigation and thus removing any obstacle in the way of defendants negotiating and consummating a sale of the West Brooklyn mining claim* on or before January 1st, 1908."

Our criticism of, and answer to, this position taken by the Court is: (1) The Copper Company never had any right to negotiate a new sale for the West Brooklyn, but only to consummate the conditional contract of purchase theretofore entered into;(2) the proofs and findings of the Court show that the Copper Company did not have any option for the purchase of the West Brooklyn for $10,000, but on the contrary did have a written option for the purchase of the *White Rock* and the *West Brooklyn claims* for $20,000 (Ex. "O", Trans. 118-119); (3) the reason why a sale was not consummated for the West Brooklyn to the Copper Company was not the pendency of the suits, but because the Millers would not allow them to take the West Brooklyn claim at $10,000, nor would they allow the Copper Company to take either claim, without taking both, nor would they allow them to pay for either claim without paying for both.

The opinion of the Supreme Court (Trans. 127) on this subject, states: "In September, 1906, Miller and Lasbury gave an option to the United Verde Copper Company for the purchase of the West Brooklyn claim and the White Rock claim (which does not figure in this suit) for the sum of $20,000."

(B.) DEFENDANTS (APPELLEES) MADE NO PROPER TENDER OF PERFORMANCE FOLLOWING WHICH PLAINTIFF (APPELLANT) WOULD BE OBLIGED TO DISMISS ITS SUIT AGAINST MILLER ET AL ACCORDING TO THE TERMS OF THE CONTRACT.

The answer presents a certain tender by the defendants; its refusal; "that such tender was in full compliance" on the part of defendants; the repeated making of such tender; the readiness of defendants to perform and a denial of default as to defendants. It also alleged a willingness to convey all of the claims except the West Brooklyn. Certain admissions made by the answer are

material and important and should not be lost sight of, notably the admission of the death of Alonzo V. Miller on December 18, 1907 (the date for performance being January 1, 1908); that Miller died in the territory of Arizona, leaving heirs surviving him, who, at the time of the filing of this suit, were non-residents of Arizona; that a tender was made on January 2, 1908, of 175,000 shares of the capital stock of the Company, $3,150.00 in money, an affidavit of assessment work and a deed executed and acknowledged by Charles C. Miller, Alonzo V. Miller and George B. Lasbury, covering the South Brooklyn, East Brooklyn, North Brooklyn, Midway and Empress claims (Alonzo V. Miller had then been dead thirteen or fourteen days); that the purpose of the deed from Alonzo V. Miller was to comply with the contract. Such deed could pass no title from Alonzo V. Miller until actual delivery. He died in December, 1907. The deed was not an escrow deed. After that deed was made out and while Alonzo V. Miller was living he made a deed to his wife under which she claimed to own the property which was delivered to her within a day or two of his death, and which she said to witness Collins (Trans. 76-77) that "Lon had left that" (meaning the West Brooklyn) "for she and the boys for a living. She said that her son George was down there and that Charles was in the navy, but he would probably come down there and assist in working the West Brooklyn claim. This is not denied anywhere. Mrs. Miller also told Mr. Pearsall the same. (Trans. 50, folio 108.)

This shows an attempted juggle of this property to suit the convenience of the Millers and to meet their emergencies. No deeds were tendered to the plaintiff or the Copper Company from Mrs. Miller as owner, nor from the heirs of Alonzo V. Miller, to-wit: Ada M. Miller,

his widow, Charles C. Miller No. 2 and George Miller, either then or thereafter. The proofs and findings show no such tender was made. The contract called for deeds from Alonzo V. Miller, Charles C. Miller and George B. Lasbury. The deed from Alonzo V. Miller did not run to *Charles C. Miller* in order to enable *him* to close the deal, but it ran to the *Brooklyn Mining and Milling Company,* which had never consented to any such arrangement, knew nothing of its execution, and could not accept such a deed as a conveyance of title after his death. The answer then says: "That such tender was in full compliance with all of the requirements of said agreement." Also: "At the time of the making of such tender plaintiff was requested in open court to dismiss" the action pending in the name of the plaintiff against the Millers and Lasbury. The answer also says "that the tender above described has been renewed," etc., which the plaintiff always refused. (Trans. 10-14.) Alonzo V. Miller delivered the deed to C. C. Miller, his agent, attached no conditions thereto preventing a recall of the deed, and established no conditions under which it could be delivered to plaintiff (appellant).

The lodgment of a deed with an agent leaves it in the possession of the grantor and is not delivery. To speak from delivery, as an escrow, a deed must be accompanied by a binding contract; the grantor must lose control over it, and it must be delivered upon the happening, or the failure to happen, of a contingency. But the contingency must be fixed by the escrow contract and the obligations and duties of the parties to the escrow contract must be defined and fixed, so that either party may enforce the delivery of the deed as a part of the terms of the contract. Whether or not this was an escrow becomes important.

Fitch vs. Bunch, 30 Cal. 208-212.

The condition of an escrow must be fixed at the time of the deposit and not subsequently.

Blight vs. Schneck, 10 Pa. St. 285, 51 Am. Dec. 478.

A necessary element of an escrow is that, when the instrument is placed with a depositary, it should be intended to pass beyond the control of the grantor for all time.

Wittenbrock vs. Cass, 110 Cal. 1, 42 Pac. 300.

Great Western Tel. Co. vs. Lowenthal, 154 Ill. 261, 40 N. E. 318.

McDonald vs. Huff, 77 Cal. 279, 14 Pac. 499.

Fred vs. Fred (N. J. Ch.), 50 Atl. 776.

Tharaldson vs. Evereth, 87 Minn. 168, 91 N. W. 467.

It necessarily follows that defendant's tender was a nullity and did not constitute performance.

Whether the tender was, or not, a full compliance with all that defendants were to do under the contract, depends upon whether they were to do any of the things offered to be done by them unless the sale was in fact consummated before January 1, 1908. We think it is clear that unless the sale of the West Brooklyn was consummated defendants would not owe the shares of stock nor the $3,150.00, etc., to plaintiff, and for that reason no tender, without the sale, could be operative.

The tender itself, without sale, also shows that defendants did not believe it was material that a sale be consummated. That the defendants were not ready and willing at all times to perform their covenants in the contract is fairly plain to see.

The only effort to deliver a deed to the Copper Company was by mailing a deed covering both the White Rock and West Brooklyn claims under the $20000.00 option, which deed was refused by Mr. Clark. No effort was made on their part to dismiss their suit until January 2, 1908.

They borrowed the money or a part thereof, to pay to plaintiff the $3,150.00 on the last day.

Lasbury and Mrs. Miller stated in December, 1907, and January and February, 1908, that the deal was off with Senator Clark (the Copper Company), because of hard times. (Trans. 49-50, 78, 76, Folio 163, Feb. 15, 1908; 75 Folio 159, Jan. 27, 1908.

They could not give a deed to all the interests, for Alonzo V. Miller was dead and Mrs. Miller held his interest. (Ex. "T", Trans. 121.) Lasbury had not been paid for his interest (Trans. 71), and was contending in the Nebraska case that the sale to the Copper Company had actually been fully consummated, and the same was true of Mrs. Miller. (Trans. 25.)

The test of whether they had a right to eliminate the plaintiff's right to the West Brooklyn depended entirely upon the Copper Company exercising its right, under its option contract of purchase, by January 1, 1908, and that it did not exercise that right is perfectly plain as will be shown later, satisfying ourselves at this time by calling attention to the refusal of Miller to let the West Brooklyn go unless the Copper Company took with it the White Rock, and no less positive refusal of the Copper Company to take any but the West Brooklyn. In this connection it is well to suggest that the provision as to the sale of West Brooklyn, to the Copper Company, was merely to protect the Millers against the outstanding option and was not a sale to Millers. But for the outstanding option all differences could and would have been settled August 27, 1907, the date of the contract. The defendants are making the fight that the Copper Company should be making, if it cared for its option.

As proof conclusive that it cared nothing for it, the Copper Company took a lease for two years on the West Brooklyn. This also shows that the Millers were trying

to get for themselves this valuable claim, and only forwarded the deed to the Copper Company January 2nd, 1908, in sheer desperation—to defeat the plaintiff, hoping thereafter to make its lease good for the unexpired two years—a most valuable lease to them, as well as to the Copper Company. The Copper Company would give $10,000 for the West Brooklyn, but rather than give $20,000.00 for the two claims preferred the lease.

Millers would not let the West Brooklyn go for $10,000.00, but as they had a two year lease with the company, would prefer to make the plaintiff accept from them the properties tendered, after which the plaintiff would be out entirely and then the Millers would keep, for themselves, the West Brooklyn claim with the benefits under the lease. Nothing seems plainer.

This is still more clearly to be seen when we consider that, if the Company took the West Brooklyn, the Millers would have to pay more to the plaintiff and Lasbury than they would get from the Company if it paid $10,000.00. This is demonstrated as follows:

If the Millers put themselves in a position to deliver the West Brooklyn to the Copper Company it would have cost them more money, by several thousand dollars, than they were to get from the Copper Company. This is demonstrated by the following tabulation:

To be paid to plaintiff (Trans. 3)	$ 8,500.00
To Lasbury for his half interest in the West Brooklyn (Trans. 71), "I was to pay Lasbury $6,000.00 for this deed"	6,000.00
C. C. Miller's one-fourth interest in the West Brooklyn	2,500.00
Assessment work on other claims	100.00
Mrs. Miller's one-fourth interest in the West Brooklyn, deeded to her by A. G. Miller	2,500.00
Total	$19,600.00

In addition to this, his suit for $5,000, and the two years lease to the United Verde Copper Company, dated in September, 1907 (Trans. 78) were to be given up, as well as relinquishing all rights in five other mining claims. These two last items we do not consider of any importance since they never had any rights in those claims. But had the West Brooklyn been conveyed to plaintiff, defendants would have retained 175,000 shares of the Company stock, which, at 3 cents per share, was worth $5,250.00, agreed upon in the contract. Miller says that he received "good pay" from the Copper Company for the silica, showing that it was very valuable. (Trans. 97.) It may be claimed that Miller did not pay Lasbury $6,000.00. Be that as it may. Until January, 1908, he agreed to pay that much, but later in the year he and Lasbury made some kind of an arrangement, which we do not know, whereby the Millers paid Lasbury $3,090.00, Mrs. Miller paying $1,500.00 some time before June or July, 1908 (Trans. 72), as testified to by C. C. Miller (Trans. 71). On page 77 of the Transcript Miller says, in referring to what Lasbury was to receive:

"The contract stated that we were to pay him a certain sum of money for his interest in a certain number of mining claims and for some stock that he owned. We paid that. I don't know the date when we paid for a deed to the property; it was prior to the time I got the deed from the bank."

Further quoting from Miller's testimony (Trans. 71): "It was not necessary to take the deed from the bank before January 1, 1908, under the contract we had with Lasbury. I didn't pay the money before that time because I wanted to hold onto the money as long as I could. *I knew we had to pay it.*" The deed was taken from the bank April 30, 1908. (Ex. "H", Trans. 54, letter and receipt at bottom thereof.) A draft was paid to Lasbury, December 13, 1907, $1,590.00 (less $4 exchange)

(Ex. "F", Trans. 53), in response to a letter from Lasbury to the bank dated December 7, 1907 (Ex. "G", Trans. 53), making $3,090.00 that was actually paid Lasbury. Assuming that that was all that Lasbury received, that would make, instead of $19,600.00, in the neighborhood of $17,000.00 that the Millers were out in actual cash, and cash values, in order to sell the West Brooklyn claim for $10,000. It may be that the Millers intended to convey the West Brooklyn to the Copper Company. We think it is safe to say that men do not pursue others who have options on their property and who are not busying themselves to enforce the option, in order to get an opportunity to inflict themselves with such a loss, and in addition thereto resist as vigorously and as expensively as they have done in this litigation, to prevent the property from going to the rightful owner.

It is a very peculiar, if not suspicious, circumstance that Lasbury was to sell to the Millers at all, if they intended to carry out a sale to the Copper Company, because Lasbury was a party to the contract of August 27, 1907, and was bound by the terms thereof to convey this property to the plaintiff if no sale was made to the Copper Company, and if a sale was made to that Company he was bound by the conditional contract of sale of 1906 to convey to them.

We fail to see and understand how the defendants can urge a condition in the contract, made for their protection against the outstanding option held by the Copper Company, as between it and the Copper Company, when the Copper Company is making no claim by virtue of its option, but rather carrying out the terms of a lease between it and these same parties, which lease is inconsistent with the option.

As stated before, but for the claim of the Copper Company under its purchase option (two claims for $20,-

000.00), all differences could and would have been adjusted on August 27, 1907.

The Copper Company had never demanded the right to take the two claims for $20,000.00 under its option, but at most, manifested its willingness to take the West Brooklyn for $10,000.00 if all litigation were ended, and an abstract of clear title was given, which Miller refused to sanction. By what right, legal or equitable, can the Millers say it will be unconscionable to require of them that which they stood ready to grant but for Copper Company's option? The Millers had no right under the option to compel the Copper Company. It therefore lost nothing by the failure of the Copper Company to purchase.

It is strange reasoning that will allow the urging of third parties' acts or omissions as an excuse for not doing today what would have been done yesterday but for the existence of a third party, as between two parties with a positive contract.

The foregoing reasons omit any consideration of the expense and loss of time to which the Millers must inevitably subject themselves in making a defense which would inure to the benefit of no one but the Copper Company. If they sincerely were willing, voluntarily and without *demand* from the Copper Company, to deed to it for $10,000.00, after litigation, this very valuable claim and surrender that valuable lease, and to that end were also willing to pay to the plaintiff and Lasbury a much greater sum than they were to receive for the West Brooklyn, there was an exhibition of abnormally unselfish, concrete equity, over which they made themselves unsolicited guardians.

The record in this case affords scanty foundation for such tribute to these defendants.

Again, the defendants were not the owners of the West Brooklyn, nor could they ever become such, under the contract.

The provisions of the contract were such that either the Copper Company was to take the claim by January 1, 1908, or it failing to do so, the defendants were to deed it to plaintiff. Their claim to ownership is but another exhibition of inconsistent issues, and reasons in this manner: "We own it. We have sold it. You prevented our selling it. If we had sold it, the Copper Company would get it. If we have not, plaintiff gets it. The plaintiff having prevented our selling it, we get it, although we were not to have it under any contingencies."

(C.) THE UNDISPUTED TESTIMONY AND ADMISSIONS OF APPELLEES (DEFENDANTS) CONCLUSIVELY SHOW THAT THE FAILURE OF APPELLANT TO DISMISS THE SUIT MENTIONED IN THE CONTRACT SUED ON HAD ABSOLUTELY NOTHING TO DO WITH AND DID NOT CAUSE THE FAILURE OF APPELLEES TO PERFORM THE CONDITION PRECEDENT OF A SALE OF THE WEST BROOKLYN TO THE UNITED VERDE COPPER COMPANY.

Much that has been said in the preceding subdivisions is applicable here. That something other than the failure of the plaintiff to dismiss its suit prevented a consummation of the sale of the West Brooklyn to the Copper Company we think is clear. In addition to the reasons above stated, there was never an option for the sale of the West Brooklyn alone, for $10,000.00 or any other sum. There was an option on the White Rock and West Brooklyn together for $20,000.00, a single consideration for both. It was this conditional sale to which reference is made in the contract in suit.

That option was extended from time to time until January 1, 1908. It existed long before there was any litigation whatever between the parties to this and the

other suits. No one availed of it. The Copper Company would not avail itself of it at any time. The Millers would not deviate from its terms, until driven to the last hateful spectacle of having to witness the plaintiff enjoy its own. It was then that the deed to the two mentioned claims was sent to the Copper Company, January 2, 1908 (Trans. 92), without the solicitation or knowledge of the Copper Company. The deed was by the Copper Company rejected. It was on that date, that defendants dismissed their suit.

The complaint was filed on February 28, 1908, and the suit to be dismissed by the terms of the contract was actually dismissed February 15, 1908.

In addition to this, the defendants have never taken the position that a dismissal would have come too late had it been done on January 2, 1908. The dismissal by both parties of all suits were provided for in like terms, and the interpretation of the contract by defendants gave each of them at least until January 2, 1908, allowing the plaintiff the last minute of that day in which to dismiss. Thus construed there could be no intervening time for making a new sale.

On page 154 of Transcript, Folio 313, we find the following, from the Supreme Court:

> "The trial Court found, and we think properly, that the failure by appellant to dismiss the action indicated in the contract, prevented appellees from consummating a sale to the United Verde Company within the period allowed them by the contract."

In view of the undisputed evidence it is little short of marvelous how such a finding could be made. Necessity compels us to go into the evidence on this point.

First of all, we note in the Arizona Supreme Court's findings (Trans. 147, Folio 301):

> "In September, 1906, Miller and Lasbury gave an option to the United Verde Copper Company for the purchase of the West Brooklyn claim and the White Rock claim (which does not figure in this suit), for the sum of twenty thousand dollars. The term of this option does not definitely appear, but it was extended at different times and kept in force up to January 1st, 1908."

This finding is in keeping with many others. The whole contract of which the terms do not "definitely appear" is to be found in the Transcript, page 118, Plaintiff's Exhibit "O". This is the only contract ever entered into, and it was not for a sale of the "West Brooklyn" alone, but for *that claim and the "White Rock" together.* One of the defendants, Lasbury, says (Trans. 51, Folio 109), in speaking to Mr. Pearsall, president of the appellant Company:

> "Well, Charlie, you know very well we have another claim we are trying to sell to Mr. Clark. If we have to make this deal we must have the West Brooklyn to make that deal."

This is nowhere denied.

Defendant Miller also said (Trans. 105, Folio 218):

> "The West Brooklyn was never referred to as a single claim. When they bought, they bought both claims; when they pay for it they pay for both claims."

This shows, to begin with that defendants were using the "West Brooklyn" to sell an inferior claim, and that they were never making any effort to sell the "West Brooklyn" alone. In addition, the undisputed evidence

shows that the failure to sell was due to other reasons than appellant's failure to dismiss the said suit. Mr. Pearsall had a conversation with Mr. Lasbury December 27, 1907, which is undisputed (Trans. 49, Fol. 105), wherein Lasbury said:

> "Charley, that deal with the United Verde is entirely off. Senator Clark won't take the property because of the hard times, he don't want to incur any further expense. I have just come up to see whether you folks won't accept the stock alone and throw off the cash payment."

Again, Mrs. Miller, another of defendants, has never denied making the following statement (Trans. 50, Fol. 107):

> "We have come up to see if we can't make some different arrangements with you about this matter of ours. *Senator Clark is not going to take claim because of the hard times.* I think you hadn't ought to ask for this $3,000.00. I think you ought to be satisfied to take the stock and let that be enough. We can't raise that $3,000.00 unless we go to the bank and borrow it. That is not possible at this time."

("Senator Clark" referred to is and was the owner of the United Verde, and the Company is meant by using his name.)

Another statement that was never denied was that of defendant Lasbury, at the time he was still a record owner of the "West Brooklyn" (Trans. 75, Fol. 159):

> "That as to closing that deal it had fallen through owing to the fact of the panic and Senator Clark said he would not take the West Brooklyn on that account. Lasbury said they had up to a certain time to close the deal and could not make it owing to the fact that Senator Clark refused

to go on, on account of the hard times. I asked him how about his deal with Pearsall, and he said that their attorneys had made a flash on Pearsall's attorneys with the money, which of course did not go. He said that the deal they had with Pearsall was off, as he would not accept the money, and he said the reason Pearsall would not accept the money was because Senator Clark did not take the property. Lasbury said it was too bad, that everything was all right and would have went through if it had not been for a shortage of money. * * * He said that if the times got better he thought they might make the deal later on."

Mr. Pearsall had a conversation December 30, 1907 (Trans. 50, Fol. 106) with Mrs. Miller and Lasbury (Trans. 50, Fol. 107). Mr. Lasbury said:

"If we ever do make this sale we will give you a bond that will give you the same amount of money we are to give you now if the sale was made."

Mrs. Miller said:

"Because if we don't make this sale before the first of January we are in duty bound to make a deed to you for this property."

Mr. Lasbury said:

"Then we will have to dance to your music."

Mrs. Miller said:

"Lon left this to me and I am going to take the boys and go down there and settle down and try to make some income from it."

Mrs. Miller made this same statement to witness Collins (Trans. 76-77) in this language:

"Lon had left that for she and the boys for a living. She said that her son George was down there and that Charles was in the navy but he would

probably come back and go down there and assist in working the West Brooklyn claim."

Mrs. Miller said to Pearsall in presence of witness North (Trans. 78, top page):

"We have come to see if we can't make some different arrangements about the terms of this contract, or words to that effect. She said that the agreement with the United Verde Company was off; that there was no possible show of its being carried through, as Mr. Clark said that owing to the financial stringency the company could not raise the money."

Mrs. Miller further stated (Trans. 78, Fol. 166):

"If we do not agree to a different arrangement we will be in duty bound to deed this property over to you according to the terms of the contract."

Further in answer to what Mr. Pearsall said "that he had no notice that the sale of this claim to the United Verde was off," Mrs. Miller said:

"Well, you have my word for it, and my word ought to be good, and I will go before a judge or notary public and make oath that the sale is off."

Witness Ensor testified as to a conversation with Lasbury (Trans. 75, Fol. 160):

"I asked him if they had put up the amount of money called for in the contract, $8,500.00, and he said no, that they had made a flash with some money and stock, and I asked him if the contract called for an equivalent, and he said no, it called for $8,500.00," etc.

Further witness asked Lasbury:

"What are you going to do with the property now, George? And he said that Mrs. A. V. Miller said that she was either going to send her son George

down there, or had sent him down, to look after her interests and in that way they hoped that they would get something out of it."

Further (Trans. 76, near top of page) Ensor said:

"Lasbury said that Senator Clark said that on account of the panic he would not take the property."

There is nowhere in the record any denial of any of these statements, but there are places in the record affirming the same which we will not now take the time or trouble to quote.

The above admissions and statements are instructive in various ways and reveal the fact that the defendants, at all times, really avoided a sale to the United Verde, and tried, by the tender hereinbefore referred to, to purchase the "West Brooklyn" for themselves.

They wanted the claim on account of the lucrative silica contracts that they had made with the United Verde. Miller testified (Trans. 97, Fol. 206):

"The United Verde Copper Company entered into a written contract with me concerning this West Brooklyn claim, either in September or August, 1906; I think possibly I may have a copy of it at home. I think Norris & Ross have a copy of it. That is a copy of the contract to purchase. *It is the only contract I ever had with the United Verde Copper Company for the purchase of this West Brooklyn claim. It had something to do with the White Rock claim; just the White Rock and the West Brooklyn.*"

Mr. Clark testified (Trans. 109) that he was the assistant manager of the Copper Company; that the option to purchase the West Brooklyn, referred to, was considered by him as still in force on the 1st day of January, 1908. (Trans. 110.) That he received by mail a deed

"such as described" (the deed referred to was a deed conveying to the Copper Company both the White Rock and the West Brooklyn claims.) (Ex. "S", Trans. 121.) Continuing his answer (Trans. 110) witness said, in answers to defendant's counsel:

"A. * * * Do you want me to state concerning the White Rock claim?
Q. No, that is not concerned in this action.
A. That cuts some figure with our option.
* * *
Q. *If* no litigation had been pending affecting the title to the West Brooklyn mining claim, and the Miller brothers had been in a position to deliver a *clear marketable title* on the 2nd day of January, 1908, would the transaction have been closed at that time, *in your judgment*" (a clear conclusion) "*in so far as the West Brooklyn* claim is concerned? *I do not care anything about the White Rock.*
A. Yes, sir, it was *understood* we would take *it* and pay for *it.*" (A conclusion, but, understood by whom?)

On page 111 of Transcript Mr. Clark said (Fol. 229):

"Q. This option was not for the West Brooklyn, it was for the West Brooklyn and the White Rock, $20,000.00 for the two claims?
A. That was the original option.
Q. That was in writing?
A. Yes, sir.
Q. This subsequent option, what was that, verbal or in writing? There was no price stated on the White Rock claim or the West Brooklyn claim in this written option?
A. I think not.
Q. $20,000 for the two claims?
A. I think so.
Q. You never decided to purchase (either of) the two claims for $20,000?

A. No." (The words "either of" in ( ) is clearly error. Trans. 112, Fol. 231.)

"Q. What did you say to them with regard to the ownership resting in the Millers if they furnished you silica at a reduced price, if anything?

A. It was then also stated by me that *we would not take the two claims at* $20,000 but *would* take the one, West Brooklyn claim, or silica deposit at $10,000.00."

Referring to a conversation that Clark had with Mr. Job in March, 1908 (Trans. 112, first question), Mr. Clark testified as follows (Trans. 113, Fol. 232):

"Q. Up to that time you had not decided?

A. Not definitely decided, we were endeavoring to decide.

Q. The Millers wanted more than $10,000 for this claim?

A. No, sir.

Q. Are you sure of that, Mr. Clark?

A. I am sure of that because I had somehow learned the price stated in this other agreement; I had never seen it and did not see it stated *until this year. I had learned that the price stated was* $10,000 *and I stated that figure.*

Q. *But they had not consented to it, had they, at that time?*

A. *I do not think they immediately consented to it because when the first proposition was made I think it was only made to C. C. Miller and we would have to hear from others.*"

On page 114, 115, Transcript, Folio 235, speaking of the West Brooklyn claim, Mr. Clark testified:

"Q. The Millers have never asked you to pay them $10,000 for this claim, have they?

A. Oh, yes.

Q. When did they ask you that, Mr. Clark?

A. *Sometime this spring we considered this question.*

Q. *Subsequent to the 1st of January?*

A. *Yes.*

Q. *I mean prior to the 1st or 2nd of January this year" (1908)?*

"A. *No, prior to the first of January the transaction was left in the hands of the attorneys to close if the suit was dismissed.*

Q. Mr. Clark, you did not consider and you have never considered that your Company has exercised this option so that the Millers could sue you and make you pay $10,000 for that claim or any of the purchase price, is that not true?

A. I never considered any such contingency; *they have never demanded it.*

Q. *You do not consider today that the United Verde Copper Company owes the Millers $10,000 for this claim, do you?*

A. *No, sir."*

This testimony of Mr. Clark shows that never, until after the 2nd of January, 1908, did the Millers consent to take, or ask for, $10,000 for the one claim, *and that was after this suit was commenced.*

In this connection we want to lay stress upon the testimony of C. C. Miller (Trans. 105, top of page):

> *"There has never been a time since August 27, 1907, when we were able to tender the United Verde Copper Company a clear title unclouded by litigation, to the West Brooklyn claim.* The agreement of option which I speak of was extended several different times. And the extension of this option run up to and beyond the first day of January, 1908, or up to January 1st. If this litigation was ended *today* we *could* close the sale with the United Verde and not only that, *but I could have had* it two years ago if we could only have cleared the litigation. Mr. Pearsall is the only man that has kept us out of the money. It has always been ready for it. We could get it this evening if this litigation was ended. When I got the $2,000 from the United Verde Copper Company in December, it was to apply upon the purchase price of the *West*

Brooklyn and White Rock together. The West Brooklyn was never referred to as a single claim; when they paid for it they paid for both claims."

This statement as to $2,000 is denied by Mr. Clark, who says, "We would not take the two claims." (Trans. 112, Fol. 232.)

Taking this testimony in connecton with that of Mr. Clark it is clear that they were unable to agree on the West Brooklyn for $10,000 until in March, 1908, when the Millers were driven to take this position under the exigencies of this litigation. At all times prior thereto, to use his own language, "the West Brooklyn was never referred to as a single claim."

Now, taking Miller's statement that the two claims were always referred to as one, and "when they bought one they bought both claims; and when they pay for it they pay for both claims," in connection with Clark's statement, "it was then also stated by me that we would not take the two claims at $20,000 but would take the one, West Brooklyn or the silica deposit at $10,000," it is inconceivable how a finding can be sustained that the litigation referred to in the contract in suit prevented a consummation of the sale, since there was no meeting, at any time, of the minds of the parties seeking to make the sale for the West Brooklyn claim to the United Verde Copper Company—the proposing seller insisted that when they paid for one they paid for both, $20,000, and the contemplating purchaser insisted that they would not take the two claims at $20,000, but *would* take one at $10,000.

We are familiar with the rule that ordinarily this Court will accept the findings of the trial Court and reviewing state or territorial Court, but when, as in this case, the claim is made that there is no testimony in

the record, anywhere, justifying such findings as are held to defeat plaintiff's right to enforce, then this Court will review the evidence, to see whether or not there is any testimony to support the findings, and for fundamental errors.

Ward vs. Sherman, 192 U. S. 168.

It seems to us that both the trial and the Supreme Courts of Arizona gave an erroneous legal conclusion to the contract sued upon and that they then based findings of fact to support the erroneous legal conclusion upon the evidence. The contract, the pleadings, the findings of fact and the evidence, when all taken together, show erroneous legal conclusions. In order to arrive at a determination as to whether this is true or not, it becomes necessary to review the evidence in the light of the legal effect of the contract and pleadings, and whether or not in this light, there is evidence tending to support the findings. It would seem this Court will look into the evidence.

Southern Pine Lumber Co. vs. Ward, 208 U. S. 126.

We quote from the syl:

> "*Halsell vs. Renfrow*, 202 U. S. 287, followed, as to when this Court, in reviewing a judgment of the Supreme Court of the Territory of Oklahoma, is confined to determining *whether that Court erred in holding that there was evidence tending to support the findings made by the trial Court*, in a case submitted to it by stipulation, without a jury, and whether such findings sustain the judgment. In this case this Court holds that the Supreme Court of the Territory did not err *in finding that there was evidence to support the findings* made by the trial Court, and that those findings sustained the judgment."

At page 127 this Court seems to recognize that it

will examine the evidence to ascertain "if there is evidence tending to support the findings."

As to whether the Court was mistaken in holding that there was evidence tending to support the findings, and that such findings sustained the judgment, we quote from pages 137-138:

> "We come to the merits. *Before doing so it is necessary to fix accurately the scope of our inquiry.* The case was submitted to the trial Court by stipulation without a jury. That Court by virtue of the Code of Civil Procedure of Oklahoma was empowered to make findings of fact as the basis of its conclusions of law. Rev. Stat. 1903 (4477) Sec. 279. On the writ of error which was prosecuted to the Supreme Court of the Territory, that Court was confined to determining whether the findings of the Court below sustained the judgment, *if there was evidence supporting the findings,* and was not at liberty to consider the mere weight of the evidence on which the findings were made by the trial Court. Under these circumstances, notwithstanding the ruling in *Nat'l Live Stock Bank vs. First Nat'l Bank,* supra, pointing out the difference between the method of reviewing a case coming from the Territory of Oklahoma and cases coming from the territories generally, our review in the case before us is confined to determining whether the Court below erred; that is, *whether that Court was mistaken in holding that there was evidence* tending to support the findings and that such findings sustained the judgment. *Halsell vs. Renfrow,* 202 U. S. 287."

In September, 1907, Miller entered into a contract with the United Verde Copper Company for the furnishing of silica from the West Brooklyn and White Rock, for a term of two years. (Trans. 68.) That contract was in force when the trial Court in its judgment extended the time to perfect a sale to the United Verde Company.

Such a contract was wholly inconsistent with any thought of selling the West Brooklyn claim to the United Verde Company, and is entirely out of harmony with a disposition on the part of the United Verde Company to take the West Brooklyn for $10,000.. This lease or contract between the United Verde and the Millers, for silica, was a denial of the right of the United Verde to purchase. While the United Verde claimed to have this option, it contracted for a part of the ground—the earth, the silica, which is real estate until removed, for twenty-one months beyond the option. When the company made such a contract, it was estopped from denying that title would remain in the Millers for that length of time because title in the Millers was essential to fulfill their contract with the Verde Company, and it would seem that the Millers abandoned all desire to dispose of the West Brooklyn as early as September, 1907.

Somewhat analogous to this proposition is the case of Davis vs. Williams, 54 L. R. A., 749, from which we quote the second syl.:

> "One entitled to specific performance of a contract to convey land is precluded from maintaining a suit therefor by the fact that after obtaining the contract he took a lease of the property, since such suit involves a denial of the landlord's title."

This shows what these parties were doing, when they were dealing responsibly with each other, and such deliberate relations and status ought not to be disturbed by crippled expressions of conclusions as to what they might or might not do, if this or that was not done.

(D.) THE DEFENDANTS HAVING TAKEN THE POSITION, BEFORE LITIGATION WAS STARTED TO COMPEL PERFORMANCE, THAT THE WEST BROOKLYN HAD IN FACT BEEN SOLD TO THE UNITED VERDE COPPER COMPANY ON OR BEFORE JANUARY 1, 1908, CANNOT, AFTER SUIT, CHANGE FRONT AND ASSERT THAT A FAILURE TO SELL WAS FOR THE FAULT OF PLAINTIFF.

Having taken the position in the motion to require the plaintiff to dismiss its Arizona suit, on January 2, 1908, that the defendants had actually consummated the sale of the West Brooklyn to the Copper Company at that time, defendants could not, under settled rules of law, later, when litigation arose, be heard to assign other reasons, such as that plaintiff prevented consummation of the sale.

> "Two defenses irreconcilably inconsistent may not be enforced, and the position assumed by the party prior to the suit relative to the facts and circumstances involved in the transaction drawn into question will prevail."
>
> *Columbia Nat. Bank vs. German Nat. Bank* (Neb.), 77 N. W. 346, Syl. 6.

The Supreme Court of Arizona states in its findings (trans. 149, last par.): On January 2, 1908, "defendants filed in action No. 4541 their written motion to dismiss said action. *Consummation of the sale of .the West Brooklyn to .the United Verde Company was claimed.*" The answer filed by Lasbury and Mrs. Miller in Nebraska says: The sale of the West Brooklyn to the United Verde Copper Company "was duly consummated within the time therein specified" (meaning in the contract of August 27, 1907), "*and the property* therein mentioned duly and properly conveyed to said United Verde Copper Company." (Trans. 25, par. 3.)

Summarizing point 2: The only reason assigned by

the lower Courts for a denial of a decree of specific performance to plaintiff (appellant) was that said appellant had not dismissed prior to January 2, 1908, the suit against defendants, mentioned in the contract. We have shown that plaintiff's actions in this particular do not, under the terms of the contract, constitute a default warranting the Courts refusing the decree prayed for for the following reasons:

A. The formal dismissal of the said suit was not a condition precedent to the sale of the Brooklyn claim to the United Verde.

B. Defendants (appellees) made no tender of performance, showing a sale to the United Verde, but at most claimed consummation.

C. The uncontroverted evidence conclusively shows that the failure of appellants to dismiss the said suit had absolutely nothing to do with appellees' failure to consummate a sale with the United Verde Company, and that fundamental errors have been committed, to the great injustice of plaintiff's rights.

POINT 3.—NEBRASKA DECREE.

The Court erred in refusing to give effect to the Nebraska decree, for the reason that it constituted an adjudication of the rights of the plaintiff and certain of the parties defendant by a Court of competent jurisdiction, and was therefore conclusive in this case as to such rights and parties as were involved therein.

(Assignments of Error 6, 7, 8, 9, and 10.)

The Supreme Court of Arizona summarily disposes of the Nebraska judgment as follows(Trans. 133, last paragraph):

"The appellant groups the assignments of error 6, 7, and 19, and under them argues that the trial court erred in not giving force and effect to the judgment of the Nebraska Court. The effect of the Nebraska decree presents an interesting question. The decision of the United States Supreme Court in *Falls vs. Eastin*, 215 U. S. 1, would indicate that the ruling of the lower court on that subject was correct, but this question was only raised in this case by the reply of the appellant to the cross-complaint of the appellees, and as the lower court gave no relief to appellees on such cross-complaint and dismissed the action for specific performance on other grounds, that feature of the case was never reached. We do not think that the point here attempted to be made will avail the appellant for the reason that the continuance in December, 1908, was granted to the appellant on the stipulation that if the case were continued, no judgment that might be secured in Douglas County, Nebraska, should be pleaded in this case. This estops the appellant from pleading the Nebraska judgment, and sustains the court's ruling that it was 'not entitled to recover anything herein under, by virtue or by reason of such re-cree. The appellant does not contend that the commissioner's deed is valid or of any effect in this jurisdiction."

The "Assignments of Error 6, 7 and 19" referred to by the Court of Arizona are the Assignments presented in appellant's brief in that Court; that being the practice therein, and in order that the Court may be fully advised as to the same they were:

Assignment VI.

"The decree and judgment of the Court is contrary to, and in violation of Article 4, Section 1, of the Constitution of the United States in that said decree and judgment ignores said section

requiring each state and territory of the United States to give full fath and credit to the judicial proceedings of every other state, in that the Court refused and failed to give faith and credit to the judgment set up in the reply to the plaintiff, which said judgment was rendered in the District Court of the State of Nebraska within and for the Fourth Judicial District of the State of Nebraska, in Douglas County thereof, although said judgment was considered by the Court and denied any force or effect, said judgment of said District Court of the State of Nebraska having been pleaded by the plaintiff and asserted in this action against the claim of defendants, George B. Lasbury and Ada M. Miller, and those defendants holding conveyances by, through or under them or either of them.

Assignment VII.

There was an error on the part of the Trial Court in that the judgment of the Nebraska Court set up in the plaintiff's reply necessarily inhered in the decision and judgment of the Court and without considering said judgment of the Nebraska Court, the Court could not enter the judgment in the instant case; and in that the consideration, and effect to be given to the Nebraska judgment aforesaid was and is necessarily involved in the consideration and determinaton of the instant case, and the Court erred in not giving faith and credit to said judgment of the Nebraska Court, as required by said Section 1 of Article 4 of the Constitution of the United States.

Assignment XIX.

The Court erred in not giving force and effect to the Special Commissioner's deed executed by order of the District Court of Douglas County, Nebraska, conveying by its terms to the plaintiff herein all the interest and title in and to said mining claims in suit which defendants, George B. Lasbury and Ada M. Miller, had or claimed

in and to said mining claims or any of them, in accordance with the decree of the District Court of Douglas County, Nebraska, which said Commissioner's deed and decree of said District Court of Nebraska were pleaded and set out by the plaintiff in its reply upon which this case was tried; that in doing so the trial court denied to the judgment and decree of the District Court of Douglas County, Nebraska, that faith and credit to which the same was entitled under and by virtue of the provisions of the Constitution of the United States, being Article 4, Section 1 thereof."

The above extract from the decision of the Arizona Supreme Court was erroneous for the reasons set out below and is covered by assignments of error 6, 7, 8, 9, and 10. Assignment 8 is misprinted, Trans, 144, and should read as follows (Original Trans. 294):

"It was error for the court to hold that the making of such stipulation estopped appellant from pleading the Nebraska judgment, for the reason that the same was made with reference to the state of the pleadings at the time."

Lasbury and Mrs. Miller were citizens of Nebraska when the Nebraska suit was commenced and as late as June or July, 1908, when Mrs. Miller went to Arizona. The Nebraska Court acquired jurisdiction over both of them by personal service the day the petition was filed. (For the Nebraska judgment, see 27-28, Transcript). That was an action for specific enforcement of the same contract as in the Arizona suit. Being predicated upon a contract, the cause of action was transitory and *in personam*, not *in rem*. At the time that suit was commenced, as well as at the time the Arizona suit was commenced, no Court had jurisdiction of all of the parties to the contract, and specific enforcement could not have

been decreed by either Court as to all the parties. Defendants, Lasbury and Mrs. Miller, were fully heard. The Nebraska Court decreed, as against them, in favor of the plaintiff to the effect that the plaintiff was entitled to specific enforcement of the contract. Trans. 27-29). Those defendants, then, were the paper owners of an undivided three-fourths interest in the West Brooklyn. The decree was entered February 8, 1909, and prior to the trial of the case in Arizona and bound Lasbury and Mrs. Miller, and their privies who took under them with notice.

> "But a judgment not only estops those who were actual parties but also such persons as were represented by those who were or claim under or in privity wth them."
>
> *Bigelow vs. Old Dominion Copper Mining & Smelting Co.*, —U .S. —, Nos. 191 and 192, Oct. Term, 1911, (May 27, 1912, pp. 3-4).

Title was in Lasbury when he signed the contract in suit, and when the Nebraska suit was instituted and service had upon him. Alonzo V. Miller's interest had been conveyed to Mrs. Miller. The Supreme Court of Arizona has settled the jurisdiction of the Nebraska Court over Mrs. Miller and Lasbury.

Butterfield vs. Nogales Copper Co., 80 Pac. 345.

We quote from that case as follows:

> "It is settled doctrine that a court of equity, having acquired jurisdiction over the person of the defendant, has jurisdiction to enter any decree which may concern or affect lands situated in a foreign state to the same extent and as fully as though these were situated within the state where the court has its situs."

One of the examples given in that opinion was spe-

cific performance affecting lands in a foreign jurisdiction. That the Nebraska judgment was binding upon the parties and their privies, as to interests in the subject matter while the suit was pending, is borne out by the following authority:

Heinze vs. Butte Mine Co. (9 C. C. A.), 129 Fed. 274, 285-6.

In addition to the fact that C. C. Miller was in privity with Lasbury he had actual knowledge of the pendency of the Nebraska suit before he acquired the deed from Lasbury. (Trans. 71-72). All facts in issue and determined, are foreclosed by the judgment of the Court, and cannot be disputed in subsequent litigation between the same parties, or their privies.

The J. R. Langdon (6 C. C. A.), 163 Fed. 472, 475-479.

Bigelow vs. Old Dom. Co., Nos. 191 and 192, above.

In the J. R. Langdon case, the point directly in issue was whether or not a lien existed against a steamboat. It was not a suit to enforce a lien. The lien was asserted by one party and denied by the other. The Court determined that a lien existed. One contention was that a maritime lien could not be enforced except in Maritime Courts, hence the Circuit Court of the United States had no jurisdiction to declare a lien. The Federal Court ruled that it had no power to *enforce* the lien, yet it had a right to *determine* whether or not a lien *existed*, apart from its enforcement, and, having once determined it, that conclusion was binding upon the maritime court in a suit to enforce the lien. In further suport of the doctrine, we cite:

Estil vs. Embry (6 C. C. A.), 112 Fed. 882.

So. Pac. Ry. Co. vs. U. S., 168 U. S. 1, 48.

Niles vs. Lee (Mich.), 135 N. W. 274, 277, Col. 2.

The Trial Court should have given full faith and

credit to the Nebraska judgment under the provisions of Article 4, Section 1, of the Constitution of the United States.

The main fact in issue in the Nebraska Court was whether or not the plaintiff was entitled to specific enforcement of the contract in suit, and, therefore, the equitable owner of the property. Incident to that fact, the Court determined rightfully whether or not there had been a consummation of the sale to the United Verde Company, and whether or not the defendants, Lasbury and Mrs. Miller, had performed the conditions required of them, which were precedent. All of these questions rest on the personal obligations of the parties, were presented by the pleadings, and fully litigated and resolved against the defendants. The remaining question is: Are the defendants bound by that decree when seeking to relitigate the same question in courts outside of the State of Nebraska, but within the United States? If the Nebraska Court had power to inquire into these facts and establish them, it had power to establish them forever. Not only are the facts actually litigated established, but the parties are precluded from litigating any question which should have been put in issue by them in order to defeat the action for specific enforcement, which would include the question of plaintiff's misconduct tending to prevent a consummation of the sale to the United Verde Company.

From *So. Pac. Ry. Co. vs. U. S.*, 168 U. S., 1, we quote Syl.:

> "A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action."

At page 48, near the bottom, and continuing on page 49:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunes would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

Under the rules of pleading in Arizona, all matters are denied which are not admitted, and new matter in an answer or cross-petition stands denied without a reply. Under the equity Federal practice, rule 45, a replication is not required unless the answer necessitates an amendment to the bill. The answer in this case is a resistance of plaintiff's cause of action with a cross-complaint asserting ownership of the West Brooklyn, by, and asking to quiet title of, defendants, by setting up ownership in the cross-complaint. The Nebraska decree became competent evidence without further pleadings, regardless of any stipulation which had been entered into prior to the

filing of the answer upon which the trial proceeded, for the reason that it rebutted facts upon which the defendant materially relied to establish their ownership in the West Brooklyn.

At page 57, *So. Pac. Ry. Co. vs. U. S.*, 168 U. S. 1, it was ruled that a former decree, which established maps identifying granted lands, was competent *as evidence, without pleadings.*

In another case than the one in which the decree was established which was offered in evidence, the So. Pac. Ry. Co. denied the identity of the lands established by the said maps. The Court said, 57:

> "But that precise issue we have seen was made in the former suit, and was determined for the United States. And to establish that fact the United States introduced the former record as evidence in its behalf. To say that the Government lost the benefit of its former judgment, covering this issue or question, because it did not amend its bill and plead the judgment as an estoppel, is to say that it was required to set out in its petition what was merely evidence to support its title to the land in controversy."

We need not discuss the effect of the stipulation to not plead the Nebraska decree, had affirmative relief not been asked. Had affirmative relief not been asked by defendants, we could have dismissed Ada M. Miller and Lasbury out of the Arizona suit without affecting plaintiff's rights.

Substantially, a new action was brought by the defendants to quiet title. In such an action it would scarcely be disputed that the Nebraska judgment would be competent and proper evidence. It, being a new action in effect, was not within the contemplation of the parties, nor the Court, when the stipulation for continuance was made.

In the Southern Pacific case, the railway company undertook to re-litigate the question of the maps and the identity of the land. The court said, bottom of page 58:

> "The manifest purpose of it was to relieve the strain of the prior decision, and, under the guise of presenting new issues of a substantial character to enable the railroad company, by introducing additional evidence on its behalf, to retry, in this collateral proceeding, the question as to the sufficiency of the maps of 1872."

Page 59, last paragraph:

> "That the record and judgment in the former cases were admissible in evidence, *without being specially pleaded*, we entertain no doubt. *And when before the court as admissible evidence, the only inquiry was whether* the *sufficiency* of the *maps* of 1872 was a *matter in issue* and *determined between the parties* to those cases. There are some cases holding that a judgment, without being specially pleaded, is not conclusive upon the issue to which it relates, but it is only persuasive evidence, and that the Court is at liberty to find according to the truth as shown by all the evidence before it. But according to the weight of authority and upon principle, *the former judgment, if admissible in evidence at all, is conclusive of the matters put in issue and actually determined by it.* Mr. Greenleaf correctly says that 'the weight of authority, at least in the United States, is believed to be in favor of the position that *where a former recovery is given in evidence, it is equally conclusive, in its effect, as if it were specially pleaded by the way of estoppel.*'"

In that case the railroad company urged upon the Court that its evidence was so overwhelming as to compel the Court, in the interest of truth and justice, to dis-

regard the former decree. Speaking to that question, at page 65, the Court said:

> "Whatever is new in the evidence now before us, touching that matter, is simply cumulative on the one side or the other. The application to consider that evidence is practically an application for a rehearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rule of *res judicata*. Without, therefore, expressing any opinion as to the effect of this new evidence relating to matters once finally adjudged, *we hold that the Southern Pacific Railroad cannot, in this proceeding, question the validity of those maps, as maps of definite location.*"

This case has been approved:

Deposit Bank vs. Frankfort, 191 U. S. 499-514.

Fayerweather vs. Ritch, 195 U. S. 276, 301.

Northern Pac. Co. vs. Slaght, 205 U. S. 122, 131.

"A judgment between two citizens or residents of the country, and thereby subject to the jurisdiction in which it is rendered, may be held conclusive as between them everywhere," even though they may be citizens of a foreign nation; and the judgment rendered in a foreign land, without the aid of the constitutional provision maintains between states and territories of this nation.

Hilton vs. Guyot, 159 U. S. 113, 170.

The constitution has made imperative, between the states, that which rested in comity between nations.

A judgment in a State Court having jurisdiction to render that judgment, is as valid in a foreign jurisdiction as in the domestic.

Harris vs. Balk, 198 U. S. 215.

In that case, the Maryland Court rendered judgment

against a North Carolina citizen who was temporarily sojourning in Maryland. Upon his return to North Carolina he was sued upon that judgment, and the North Carolina Court refused to recognize the Maryland judgment. That case was taken to the Supreme Court of the United States, and it said at page 221:

> "If the Marlyland Court had jurisdiction to award it, the judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment."

If the answer and cross-petition presented new issues calling for litigation of the questions ruled in the Nebraska decree, and it was proper, in meeting such new issues, to plead the Nebraska decree as soon as defendants made new issues, the stipulation could not estop plaintiff in its rights so made and created by defendants, voluntarily and of their own motion.

Once properly pleaded, proof thereof was in order.

Until the proofs were all before the court no one could see to the end of the trial, including what the trial court would ultimately say, and determine what the pleadings should be, by that method. If proper to present a proper issue, at the time it was offered, testimony properly received under it is firmly lodged in the record and should be considered for what it will prove.

No matter what view the Court finally takes of the claims of defendants, the evidence remains in the case with all its probative force.

If such evidence properly gets into the record, no matter how, whether based upon some affirmative allegation in a pleading or by reason of independent rules of law applicable to its admission, and that evidence is made a verity by the Constitution, courts will not be heard to say that full faith shall not be given a judgment of a

sister state merely because not pleaded. There is a pronounced difference between *pleading* a given truth and *proving* it.

The provisions of the decree by the trial court were: If within ninety (90) days from the date thereof, defendants shall consummate or make *a binding contract* for the sale of the West Brooklyn to the United Verde Copper Company, and pay over, or tender to plaintiff the money, stocks, deed and proof of assessment work, as provided in the contract of August 27, 1907, then the decree will forthwith become final, irrevocable, and non-appealable, and plaintiff shall be *forever barred and estopped* to claim any *right*, title or interest in or to the West Brooklyn Mining Claim; thus, in effect, and directly, giving defendants affirmative relief based upon their amended answer and cross-petition as prayed for therein. But for such amended answer the Court could not have decreed that the plaintiff did not have or could not thereafter have any right, title or interest in and to that claim, and could not adjudicate that the plaintiff be forever barred and estopped to claim any interest therein.

In this connection we want to call the attention of the Court to the language of the Supreme Court of Arizona in dealing with this question. (Trans. 133-4, near bottom page):

> "The effect of the Nebraska decree presents an interesting question. The decision of the United States Supreme Court in *Fall vs. Eastin*, 251 U. S. 1, would indicate that the ruling of the lower court on that subject is correct, but this question was only raised in this case by the reply of the appellant to the cross-complaint of the appellees, *and as the lower court gave no relief to appellees on such cross-complaint* and dismissed the action for specific performance on other grounds, that feature of the case was never reached."

The Supreme Court of Arizona evidently overlooked this affirmative relief granted by the decree of the trial court, and is mistaken, we think, when it says that "the lower court gave no relief to appellees on such cross-complaint."

In order to see that the Court was mistaken, we invite attention to the second and third paragraphs of the cross-complaint (Trans. 14), as follows:

> Paragraph 2. "That cross-complainants above named are the owners, entitled to the possession and in the possession of that certain mining claim situated in the Big Bug Mining District of Yavapai County, Arizona, and described as follows: 'West Brooklyn,' notice of location whereof is of record in book 67 of Mines, page 408, records of Yavapai County, Arizona."
>
> Paragraph 3. "That cross-complainants herein are credibly informed and believe that plaintiff, Brooklyn Mining & Milling Company, makes some claims to said mining claim adverse to these cross-complainants. Wherefore cross-complainants pray judgment as follows: (1) That cross-complainants' estate in said mining claim be established. (2) That said Brooklyn Mining & Milling Company, a corporation, be forever barred and estopped from having or claiming any right or title to said premises adverse to said cross-complainants."

The exact language of the decree is: "Plaintiff shall be forever barred and estopped to claim any right, title or interest in or to said 'West Brooklyn' Mining claim." (Tr. 41, par. 3).

This provision of the decree goes beyond adjudicating affirmative relief in behalf of defendants, by penalizing the plaintiff (trans. 40, second paragraph of decree), "if plaintiff shall fail or refuse to file herein within said period of 30 days from the date hereof its written con-

sent and waiver," etc., by dismissng the suit presented by its complaint, in addition to destroying its claim in and to the West Brooklyn regardless of the sale, to say nothing of attempting to deprive the plaintiff of its constitutional right to appeal, thus putting the plaintiff, in the language of Mr. Justice Holmes *(Stoffela vs. Nugent,* 217 U. S. 499, 501), in the position of becoming "an outlaw and *caput lupinum.*"

The Supreme Court further said (trans. 134) in speaking of the Nebraska decree: "That feature of the case was never reached." We think this is a misconception of the decree. The trial court reached far enough into the issues presented by the cross-complaint to decree that the plaintiff could not have and hold an interest in the land in the future, unless it saw fit to file the written consent imposed, thus ignoring utterly the Nebraska decree, which showed that the plaintiff did have at least a three-fourths interest in the West Brooklyn claim. And the constitution says it shall not be ignored where it is a necessary question involved, because it shall receive full faith and credit. Giving to the Nebraska decree full faith and credit would entirely prevent the adjudication to the effect that "plaintiff shall be forever barred and estopped to claim any right, title or interest in or to said West Brooklyn Mining claim."

It is true that in the opinion of the Supreme Court and its final action in this case it said (Trans. 134, Fol. 274):

> "For the full protection of the appellant from any prejudicial effect of any portion of the decree, other than that of dismissal, the judgment of this Court is that the judgment and decree of the lower Court be modified to read, 'It is ordered, adjudged and decreed that plaintiff's action shall stand dismissed and plaintiff shall take nothing thereby," etc.

This, in effect, was the withdrawal by the Supreme Court of the allegations and prayer in the cross-complaint; elimination of the Nebraska decree as evidence, by withdrawing that issue, and materially emasculating the pleadings and proofs. It trimmed down the pleadings, the evidence and the decree of the trial Court. No matter what the means may have been of refusing consideration of the Nebraska decree, the effect is the same, —it has not been given faith and credit, because if it had been the Court would have been necessarily compelled to find, the Nebraska judgment being properly in evidence, that the plaintiff was in fact entitled to specific performance of the contract as against the Nebraska defendants and therefore was entitled to a like performance against the Arizona defendants, in so far as they were in privity with the Nebraska defendants.

The pleadings, as filed, present on the side of the plaintiff, allegations and prayer which it claims entitles it to specific performance—affirmative relief; on the side of the defendants, a resistance of that claim, and allegations and prayer which they claim entitle them to have the Court dismiss the plaintiff's complaint, and after that is done, grant defendants a decree adjudging them to be the owners of the property and forever barring plaintiff from claiming any interest therein, also affirmative relief.

It cannot be denied that these issues were before the Court and the Court could not, of its own motion, strike out from the pleadings any such issues, simply because it did not care to try them. This being true, it became the duty of the Court to dispose of these issues. The trial Court took that view and disposed of those issues by adjudging: (1) That the plaintiff's complaint be dismissed, (2) having dismissed the plaintiff's complaint, that the defendants be freed from any interference by plaintiff by reason of any claim to the property which the plain-

tiff might theretofore have asserted,thus disposing of the issues presented by the defendants. Had the case ended there, every issue presented would have been cared for. It did not end there. An appeal was taken to the Supreme Court of Arizona, which Court, in disposing of the Nebraska decree, dismissed the complaint, leaving suspended the cross-complaint and the issues thereby presented. Nowhere does the Arizona Supreme Court, in its decree, respond to all the issues presented, and, so far as we know, the cross-complaint is still pending somewhere—we don't know where—because the Arizona Supreme Court did not remand the case to the lower Court and did not reserve the right, in itself, to later dispose of it. The plaintiff certainly has a right, as against it, to have the suit represented by the cross-complaint disposed of.

CONCLUSION.

We think the decree of the lower Court ought not to stand; that owing to the nature of the case, the state of the pleadings and the uncontroverted evidence, it should be set aside, and that this is a case for this Court to order a reversal, with directions to the lower Court to enter judgment for plaintiff. This we pray.

Respectfully submitted,

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APPELLEE'S

BRIEF

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

BROOKLYN MINING AND MILLING COMPANY,
Appellant,
vs.
CHARLES C. MILLER, et al.,
Appellees.
No. 144.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF ON BEHALF OF APPELLEES.

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Of Counsel.

SUBJECT INDEX.

ALPHABETICAL LIST OF CASES REFERRED TO.

STATEMENT.

We adopt as our statement of the case the findings in the nature of a special verdict made by the Supreme Court of the Territory of Arizona, signed by Chief Justice Kent.

Prior to December, 1906, the appellant, Brooklyn Mining and Milling Company, a corporation, was the owner of the Brooklyn mining claim in Yavapai County, Arizona. Charles W. Pearsall was then and at all times since has been a stockholder of that corporation, and ever since January, 1907, has been president thereof. Alonzo V. Miller, George B. Lasbury, and Charles C. Miller were also stockholders in said company, and prior to December, 1906, had located in their own name, together with one Thomas H. Ensor as co-locator three mining claims adjoining the Brooklyn claim, known as the West Brooklyn, the East Brooklyn and the South Brooklyn claims. In August, 1906, Lasbury acquired Ensor's interest in the three claims by deed recorded September 18th, 1906, after which date Alonzo V. Miller, George B. Lasbury and Charles C. Miller were the record owners of said claims. In September, 1906, Miller and Lasbury gave an option to the United Verde Copper Company for the purchase of the West Brooklyn claim and the White Rock claim (which does not figure in this suit), for the sum of twenty thousand dollars. The term of this option does not definitely appear, but it was extended at different times and kept in force up to January 1st, 1908.

In December, 1906, Pearsall, in behalf of himself and other stockholders instituted a suit (No. 4541)

in the District Court of Yavapai County against the Millers and Lasbury for the purpose of having it declared that the Millers and Lasbury held the title to the West, East and South Brooklyn claims in trust for the Brooklyn Company, and to require them to convey said claims to the company. An amended complaint was filed on July 7th, 1907, in this action naming the Brooklyn Mining Company as plaintiff. In May, 1907, Charles C. Miller brought suit against the Brooklyn Company for five thousand dollars claimed to be due him for work done upon the Brooklyn claim. While both suits were yet pending a compromise agreement was made between the parties on August 27th, 1907, as follows:

"Whereas, an action is now pending in the District Court of Yavapai County, Arizona, entitled Brooklyn Mining & Milling Company et al. vs. Charles C. Miller, Alonzo V. Miller and George B. Lasbury, which action relates to the title of the West Brooklyn, East Brooklyn and South Brooklyn Mining Claims located in said County and Territory, and relates to an accounting for ores and minerals taken therefrom, and

"Whereas, The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury have made a conditional sale of the above named West Brooklyn Mining claim for the sum of ten thousand dollars to the United Verde Copper Company, and

"Whereas, an action is pending in the District Court of Yavapai County, Arizona, entitled Charles C. Miller v. Brooklyn Mining & Milling Company for several thousand dollars claimed to be due and

owing to the said Charles C. Miller for services performed by him and Alonzo V. Miller for the said Brooklyn Mining & Milling Company, and

"Whereas, It is the desire of the parties connected with the foregoing causes of action to settle the same, and to adjust the matters of difference between the parties in connection therewith;

"Therefore, In consideration of the dismissal and settlement of the foregoing causes of action it is hereby stipulated and agreed by and between the Brooklyn Mining & Milling Company and Charles C. Miller, Alonzo V. Miller and George B. Lasbury that if the sale of the West Brooklyn Mining claim to the United Verde Copper Company is consummated on or before the first day of January, 1908, the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to transfer and deliver to the said Brooklyn Mining & Milling Company one hundred and seventey-five thousand shares (175,000) of stock in said Brooklyn Mining & Milling Company, free and clear of all liens and incumbrances whatsoever; it being understood that said transfer of stock is to include all of the holdings of said Charles C. Miller, Alonzo V. Miller and George B. Lasbury in the Brooklyn Mining & Milling Company, and the said parties are to receive therefor the sum of 3 (Three) cents per share for said stock; and in addition thereto Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to pay to the Brooklyn Mining & Milling Company the sum of eight thousand, five hundred dollars ($8,500.00) out of the proceeds derived from the sale of the said West Brooklyn mining claim; in addition thereto

the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey all of their right, title and interest in and to the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and said transfer shall contain the warranty that the assessment work has been done for the year 1907 upon the Empress, Midway and North Brooklyn, and the said Brooklyn Mining & Milling Company shall pay the said assessment work at its reasonable value. The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury agree to do the assessment work for the year 1907, on the East and South Brooklyn mining claims, and said assessment work so to be performed is to be paid by the Brooklyn Mining & Milling Company at its reasonable value. It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury shall not be consummated on or before the first day of January, 1908, then the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey to the Brooklyn Mining & Milling Company all of their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value.

It is understood by and between the parties hereto that the foregoing does not concede or admit any of the allegations contained in the pleadings of said

causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties and avoiding further costs and expenses to the parties hereto.

IN WITNESS WHEREOF, We have hereunto set our hands this 27th day of August, A. D., 1907.

C. C. MILLER
A. V. MILLER
G. B. LASBURY
BROOKLYN MINING & MILLING COMPANY
By Chas. W. Pearsall, President."

On December 17th, 1907, Alonzo V. Miller executed, acknowledged and delivered to Ada M. Miller a deed, conveying to her his interest in the West Brooklyn claim. On December 18th, 1907, Alonzo V. Miller died, leaving a widow, Ada A. Miller, and two sons, viz: Charles C. Miller No. 2, and George M. Miller, a minor.

In December, 1907, counsel for Lasbury and the Millers requested a dismissal of action No. 4541 and directed a dismissal of No. 4608 (the case of Miller v. the Company). Counsel for the company declined to dismiss the case against the Millers, and the formal dismissal of the Miller case was not entered of record until January 2nd, 1908.

On January 2, 1908, the case of Miller against the Brooklyn Company, No. 4608, was dismissed. On the same date defendants filed in action No. 4541 their written motion to dismiss said action. Consummation of the sale of the West Brooklyn to the United Verde Company was claimed, and a tender of performance of the obligation of the Millers

and Lasbury, under the agreement of Auguts 27, 1907, was made. This tender was refused by counsel for the appellant on the ground that it did not fully comply with the terms of the agreement, and counsel again declined to dismiss the suit, No. 4541.

On January 28, 1908, the Brooklyn Company brought suit in the District Court of Douglas County, Nebraska, against Charles C. Miller, George B. Lasbury and the survivors of Alonzo V. Miller, viz: Ada M. Miller, Charles C. Miller No. 2 and George M. Miller, a minor, for the specific performance of the agreement of August 27, 1907, and George B. Lasbury and Ada M. Miller were personally served with process in Nebraska.

On February 11, 1908, the Brooklyn Company filed a supplemental complaint in case No. 4541, in which it set up the contract of August 27, 1907, and asked for specific performance thereof, by requiring defendants to convey the West Brooklyn claim, and others, to plaintiff.

On February 15, 1908, the Brooklyn Company dismissed action No. 4541 involving the title to the West Brooklyn claim, being the action, the dismissal of which was stipulated in the agreement of August 27, 1907, and on the same date, immediately thereafter, filed another action No. 4923, for specific performance of the contract of August 27, 1907, wherein the company claimed ownership of the West Brooklyn by virtue of the contract of August 27, 1907, and asked that defendants be required to convey the same to the Company, and that the Company's title therein be quieted.

On February 18, at 9 o'clock A. M., the Brooklyn

Company dismissed action No. 4923, and on that date at 9:10 A. M., filed the case at bar, No. 4927.

The actions numbered 4541, in which a lis pendens was filed, and 4923 and 4927, and the suit brought in Nebraska on January 28, 1908, all involved the title to the West Brooklyn claim, and in all of said actions the Brooklyn Company sought a specific performance of the contract of August 27, 1907. In action 4541 specific performance was asked by the supplemental petition above mentioned.

On December 23, 1908, the case at bar came on for trial in Yavapai County, and the plaintiff asked for a continuance. This was contested by the defendants, and the pendency of the action in Nebraska urged by them as ground for a trial at that time. It was then stipulated that if the case was continued no judgment which might be secured in Douglas County, Nebraska, should be pleaded in this action. "That counsel for appellant thereupon stated in effect, that they would agree if said cause were continued that no judgment which might be secured in the District Court of Douglas County, Nebraska, in an action then pending between the same parties should be pleaded in this action, whereupon the following colloquy took place:

By Mr. Norris (counsel for appellees): It is stipulated that no judgment in the Omaha court will be pleaded in this court, and it is admitted that it can have no effect on the trial of the proceedings in this court.

By Mr. Job (counsel for appellant): That is going beyond my province, as to what effect it will have.

By Mr. Norris: I assert it, and our correspondence clearly shows that.

By Mr. Ross (counsel for appellees): That is sufficient, that will not be pleaded.

By the Court: Yes, if it is not pleaded it will not amount to anything."

Thereupon, the continuance was granted on the motion and at the cost of the Brooklyn Mining & Milling Company, plaintiff.

On February 8, 1909, the Nebraska case was decided in favor of the company. The Nebraska court held that the sale of the West Brooklyn had not been consummated as provided for in the agreement of August 27, 1907, and decreed that George B. Lasbury and Ada M. Miller specifically perform the obligations devolving upon them under the compromise agreement by reason of the non-consummation of the said sale, and decree that George B. Lasbury and Ada Miller convey to the Brooklyn Company all their right, title and interest in the West Brooklyn claim and the five other claims named in the compromise agreement, and in default of their doing so a master be appointed by the court to make such conveyance. No parties to the Nebraska suit were served with process or appeared except Ada M. Miller and Lasbury. The master appointed by the court thereafter executed and delivered a conveyance of the claims mentioned to the Brooklyn Company.

On March 25, 1909, the case at bar came on for trial in the District Court of Yavapai County, and

on April 24, 1909, judgment was rendered therein. Immediately prior to the trial of the case, and on March 23, 1909, the plaintiff filed a reply to the amended answer and cross-complaint (which amended answer and cross-complaint was filed February 8, 1909), in which reply it pleaded the judgment and decree of the Nebraska court, and the conveyance by the commissioner thereunder. This reply was treated as a reply to the amended answer and cross-complaint filed March 25, 1909, which was substantially identical with that filed February 8, 1909, except that in the answer of March 25th George Miller, a minor, appeared by his guardian ad litem.

In a written decision filed on April 24th, the Court found that the sale of the West Brooklyn to the United Verde Copper Company by the defendants had not in fact been consummated on or before January 1st, 1908, but that the failure to consummate such sale was caused by the failure and refusal of the plaintiff to dismiss the action No. 4541 brought by the plaintiff against the defendants in December, 1906, which involved the title to the West Brooklyn claim, and the dismissal of which was made obligatory upon the plaintiff by the terms of the agreement. The court found from the record that this suit was not dismissed until February 15th, 1908, and that another similar suit was brought by the plaintiff before an opportunity was afforded the defendants to consummate said sale. That the defendants, prior to January 1st, 1908, endeavored to effect the sale to the United Verde, and that the pending litigation prevented such sale; that the United Verde had ever since

been willing to make the purchase at the price of ten thousand dollars if pending litigation was dismissed, and a clear title could thereby be given them. The court then held that the plaintiff was not then in a position to enforce specific performance on the part of the defendants for the reason that it was itself at fault in not dismissing the litigation, thus removing the obstacle to the negotiation and consummation of the sale. The court further held that as all the parties were before the court, and the agreement was regarded by the parties as still in force, that he would not dismiss the action, but would grant to the defendants reasonable time to consumate the sale under the terms of the agreement. The judgment of the court therefore was that an interlocutory order and decree be entered, giving the defendants ninety days from that date to make the sale and comply with the other terms of the agreement. Thereupon the court caused an interlocutory decree to be entered as follows:

"This cause came on regularly to be heard on the 25th day of March, 1909, plaintiff appearing by John J. Hawkins and T. C. Job, Esqs., its attorneys, and F. S. Howell of counsel, and defendants, Charles C. Miller, Ada M. Miller, Charles C. Miller No. 2 and George Miller, a minor, by Charles C. Miller No. 2, his guardian ad litem, appearing by Reese M. Ling, Esq., and Messrs. Norris & Ross, their attorneys.

A jury being expressly waived by both parties, the cause was tried to the court upon plaintiff's amended and supplemental complaint, the amended answer and cross-complaint of defendants Charles

C. Miller, Ada M. Miller, Charles C. Miller No. 2 and Charles C. Miller No. 2 as guardian ad litem of George Miller, a minor, and plaintiff's reply to said amended answer and cross-complaint, together with said defendants' motion to strike and replication addressed to said reply. Evidence both oral and documentary was introduced on behalf of the respective parties, and the parties rested, and the cause was submitted to the court for its decision and judgment. Thereafter it was argued to the court by counsel of the respective parties through written briefs.

The court having considered the evidence in said cause, the argument of counsel, and the principles of law and equity applicable thereto, and being fully advised in the premises, on the 24th day of April, 1909, made and filed its written decision herein, and orders that a judgment and decree be entered in accordance therewith.

Now therefore, for the purpose of giving defendants an opportunity to consummate the sale of the "West Brooklyn" mining claim to the United Verde Copper Company, or make a binding contract for such sale free and clear of all claims and litigations on the part of plaintiff touching or questioning said title, and in accordance with said written decision and for the purpose of fully determining the rights of the parties hereto under the contract sued upon an alternative decree is hereby made and entered herein as follows, to-wit:

(1) That within thirty (30) days from the date hereof plaintiff shall file herein its written consent that this decree conditional upon a sale of the

"West Brooklyn" mining claim to the United Verde Copper Company as hereinafter provided shall become final, irrevocable and non-appealable, and consenting that said defendants within the time hereinafter stated may make a sale or a binding contract therefor of the "West Brooklyn" mining claim to the United Verde Copper Company free and clear of all claims and litigations on the part of plaintiff questioning or effecting the title to said claim.

(2) That if plaintiff shall fail, or refuse to file herein within said period of thirty days from the date hereof its written consent and waiver as provided herein, then and in such event plaintiff's action herein shall stand dismissed as of this date and plaintiff shall take nothing thereby.

(3) Ordered, adjudged and decreed that if within ninety days from the date hereof said defendants shall consummate or make a binding contract for the sale of "West Brooklyn" mining claim to the United Verde Copper Company, and shall deliver and pay over or tender to plaintiff herein the money, stocks, deed and proof of assessment work which is provided by the contract of August 27th, 1907, shall be paid over and delivered by defendants to plaintiff, then and thereupon this decree shall forthwith become final, irrevocable and non-appealable as of this date, and plaintiff shall be forever barred and estopped from claiming any right, title or interest in or to said West Brooklyn mining claim.

(4) Ordered, adjudged and decreed that if plaintiff within the period aforesaid shall file its said written consent and waiver as above provided, and

defendants shall fail to make such sale or binding contract therefor to the United Verde Copper Company, and to pay over and deliver or tender the money, stocks, deed and proof of assessment work aforesaid within the said period of ninety days, then and thereupon defendants shall forthwith execute and deliver to plaintiff a valid and sufficient deed conveying to plaintiff all their right, title and interest in and to the "West Brooklyn" mining claim as mentioned and provided in said agreement of August 27th, 1907, and said agreement shall be fully carried out by all the parties hereto.

(5) Ordered, adjudged and decreed that plaintiff is not entitled to have or recover anything herein, by virtue or by reason of that certain decree described in plaintiff's reply to defendants' cross-complaint herein rendered by the District Court of Douglas County, State of Nebraska, that the commissioner's deed made under and pursuant to said decree is void and of no force or effect, and that said deed does not constitute a cloud upon the title of the "West Brooklyn" mining claim.

(6) Ordered, adjudged and decreed that plaintiff is not in any event entitled to an accounting herein, or to have or recover in this action on account of silica heretofore sold or shipped by defendants or any of them from the "West Brooklyn" mining claim, and defendants shall have and recover from plaintiff their costs herein taxed at $37.35.

Done in open court this 24th day of April, 1909.

Richard E. Sloan, Judge."

The appellant failed and refused to file within

thirty days after said decree its consent as provided in paragraphs 1, 3 and 4 of the same. Its failure and refusal to file its consent as provided in said decree, renders the decree as set forth in paragraphs 1, 3, 4, 5, and 6, inoperative, and leaves as a final and substantive decree only paragraph 2 dismissing the plaintiff's action.

The denial of an accounting as mentioned in paragraph 6 was inadvertently ordered, for the dismissal without prejudice of that part of the complaint which called for an accounting, on March 26, 1909, would prevent the court from adjudicating that question in this case.

It is conceded that the sale of that West Brooklyn to the United Verde Copper Company was not consummated prior to January 1, 1908, also that action No. 4541 entitled Brooklyn Mining & Milling Company vs. Charles C. Miller, Alonzo V. Miller, and George B. Lasbury, which related to the title of the West Brooklyn was not dismissed prior to January 1, 1908.

The trial Court found, and we think properly, that the failure by appellant to dismiss the action indicated in the contract, prevented appellees from consummating a sale to the United Verde Copper Company within the period allowed them by the contract. Therefore, upon the state of facts existing at the time of the trial, appellant was not entitled to specific performance. We further find that the failure of appellant to accept the terms offered by the court in its decree leaves it in the position where the record puts it, with the complaint dismissed for want of equity.

In the trial court below plaintiff plead by reply to the cross-complaint of appellees, the Nebraska judgment and decree. The effect of the Nebraska decree presents an interesting question. But this question was only raised in this case by the reply of the appellant to the cross-complaint of the appellees, and as the lower court gave no relief to appellees on such cross-complaint and dismissed the action for specific performance on other grounds, that feature of the case was never reached.

We find that the Nebraska decree herein referred to is set out as exhibit "D" to appellant's reply to appellees' amended answer and cross-complaint, and was offered in evidence with appellant's Exhibit "L," and that the decision of the Nebraska court is set out as Exhibit "A" to appellees' replication; these references being made at this point to avoid repetition.

The appellant claims that it only plead the Nebraska decree because after the stipulation above mentioned had been made, the appellees filed a cross-complaint claiming title to the property mentioned in the contract. We do not think that the contention attempted to be made will avail the appellant for the reason that the continuance of December, 1908, was granted appellant on the stipulation that if the case were continued, no judgment that might be secured in Douglas County, Nebraska, should be pleaded in the case. We find that this estops the appellant from pleading the Nebraska judgment, and sustains the lower court's ruling that it was "not entitled to recover anything herein under, by virtue of or by reason of" such decree.

The appellant does not contend that the commissioner's deed is valid or of any effect in this jurisdiction. The decree that the commissioner's deed is void and does not constitute a cloud upon the title to the West Brooklyn claim, while sound as a declaration of law, was not necessary to the determination of the question finally decided by the court, and for that reason has no place in the decree.

As conclusions of law from the foregoing facts we find that the judgment of the lower court should be affirmed, but for full protection of the appellant from any prejudicial effect of any portion of the decree other than that of dismissal, the judgment of this court is that the judgment and decree of the lower court be modified to read, "It is ordered, adjudged and decreed that plaintiff's action shall stand dismissed, and plaintiff shall take nothing thereby, and that defendants shall have and recover from the plaintiff their costs herein, taxed at $37.35," and that such modification of the judgment of the lower court is affirmed.

(All references herein to transcript are to the original or marginal pages.)

This appeal brings into review the decree of the Supreme Court of the Territory of Arizona affirming the judgment of the District Court.

PROPOSITION I.

The findings of the District Court adopted by the Supreme Court in its judgment of affirmance brought here as a statement of facts in the nature

of a special verdict, present the sole question for determination, apart from exceptions duly taken to rulings on the admission or rejection of evidence—do the findings of fact support the judgment?

This well recognized principle of practice is uniformly adhered to by this court, as will appear by reference to the following cases, which we are content to cite without further comment:

Samuel Stringfellow v. Jos. M. Cain et al., 99 U. S. 610.

Neslin v. Wells Fargo Co., 104 U. S. 428.

EILERS v. Boatman et al., 111 U. S. 356.

Idaho & Oregon Land Imp. Co., v. Bradbury, 132 U. S. 509.

Mammoth Mining Co., v. Salt Lake Machine Co., 151 U. S. 450.

Haws v. Victoria Copper Min. Co., 160 U. S. 303.

Gildersleeve v. New Mexico Min. Co., 161 U. S. 573.

Bear Lake & River Water Works & Irr. Co., v. Garland et al., 164 U. S. 18.

Harrison v. Perea, 168 U. S., at page 323.

We take it as conceded that the consideration for the contract of August 27, 1907, upon which this action is based was the dismissal and settlement of the then pending litigation.

Added to this, the controlling facts found are:

(1) That the contract made it obligatory upon appellant to dismiss action No. 4541, which involved

the title to the West Brooklyn claim, prior to January 1st, 1908.

(2) That appellant failed and refused to dismiss said action within the time.

(3) That the failure and refusal to so dismiss said action No. 4541 caused the failure of appellees to consummate the sale to the United Verde Copper Company within the period allowed by the contract, to-wit, January 1st, 1908.

The findings of the court show a deliberate, persistent and successful attempt to defeat the sale to the United Verde Copper Company.

Counsel for appellees requested dismissal of action No. 4541, Brooklyn Company v. Millers, in December, 1907, and directed the dismissal of action No. 4608, Miller v. the Company, but appellant declined to dismiss the action against Millers (Trans. 304).

Again, on January 2, 1908, appellees filed a motion in cause No. 4541 to require its dismissal under the agreement of August 27, 1907, and again dismissal was declined (Trans. 304-5).

On January 28, appellant brought suit in the District Court of Douglas County, Nebraska, against appellees for the specific performance of this agreement (Trans. 305).

On February 11 appellant, instead of dismissing action 4541, as provided by the contract of August 27, 1907, filed a supplemental complaint therein asking for specific performance of that identical contract, (Trans. 305).

On February 15th it dismissed action 4541 involving the title to the West Brooklyn claim, and immediately filed action 4923 for the specific performance of the same contract, wherein it claimed ownership of the West Brooklyn by virtue of the contract of August 27, 1907, and asked that a conveyance from appellant to it be required and that appellant's title be quieted therein (Trans. 305-6).

On February 18, 1908, at nine o'clock a. m., the Brooklyn Company dismissed action 4923, and at nine o'clock and ten minutes, same day filed the case at bar, No. 4927 (Trans. 306).

The actions numbered 4541, in which a lis pendens was filed, 4923 and 4927, and the suit brought in Nebraska on January 28, 1908, all involved the title to the West Brooklyn claim ,and in all of the actions the Brooklyn Mining Company sought specific performance of the contract of August 27, 1907. In action 4541 specific performance was asked by the supplemental petition (Trans. 306).

There could be no plainer or more conclusive proof of appellant's deliberate, persistent and successful attempt to circumvent the performance by appellees and bring about the default complained of.

The court's conclusion of law drawn from the foregoing facts, that appellant is not entitled to specific performance because of its own failure and refusal to perform, is unavoidable. Appellant's complaint was properly dismissed for want of equity. It had no right to require specific performance because it was itself at fault in enforcing the condition it urges as the reason for its action.

The findings are so plain and simple and the conclusions of law so unavoidable and direct in support of the judgment that we do not feel called upon to tax the court's attention with further argument on this phase of the case.

There is no question here for the court's consideration upon exceptions taken to rulings on the admission or rejection of testimony and we do not hesitate to urge with confidence that the decision of the Supreme Court of the Territory of Arizona be affirmed.

We do not find that appellant has properly brought here any question for consideration beyond the foregoing. But it has extensively argued questions which we do not believe can properly be considered; however, if they are examined, it must necessarily confirm our position that the findings not only support the judgment, but are in all respects proper findings.

PROPOSITION II.

The contract of August 27, 1907, was in the alternative. Appellant had no right to a choice of its alternatives unless appellees should fail without any fault of appellant. When by its own wrong appellant brought about the condition complained of, it was properly denied specific performance.

Under Point I, (p. 21 of Appellant's Brief,) it is urged that appellant was entitled to specific performance of the contract in suit without regard to whether it prevented the consummation of the sale

to the United Verde or not. Under this head there is considerable juggling of the words "sale," "confirmation," "transfer," "delivery," and "receipt of all the money." It is contended that appellees did not charge appellant with causing their failure to make the sale, but only their failure to have fully and completely transferred and delivered the title and to have received all the money in payment therefor.

The contract itself recites a conditional sale in existence at the time it was made, of the West Brooklyn to the United Verde for $10,000.00 (Trans. 3) and provided that the litigation then pending should be dismissed and gave appellees thereafter to January 1, 1908, to consummate that sale. So there was nothing left to be done but a transfer of title completing a full conveyance and receipt of the purchase price. What more under this state of facts could appellant have prevented?

The argument of appellant would indicate that the contract wherein it recited "if for any reason the sale * * * * shall not be consummated, the defendants are to deed to the plaintiff the West Brooklyn," authorized it to defeat the consummation of the sale by any means possible, equitable or inequitable, and yet enforce this conveyance (p. 29 Appellant's Brief).

The academic discussion following this proposition in appellant's brief and the citation of authorities as to what constitutes a sale or binding contract of sale in given cases, is quite apart from the question at issue.

PROPOSITION III.

Appellant's default in failing and refusing to dismiss action 4541 before January 1, 1908, and its tenacious maintenance of the suit as a pending action with its consequences, was ample and sufficient reason for the court's refusing a decree of specific performance.

Under Point II, p. 32 of Appellant's Brief, the argument is found that it was guilty of no default which would warrant the court in denying the decree of specific performance. In the same breath that it admits default in refusing to dismiss its action against appellant prior to January 1, 1908, it is contended (under sub-division A, same page), that if the contract itself did not operate to dismiss the action, appellant had the right to formally dismiss at any time prior to the decree for specific performance. How can this position be reconciled with the effort to compel specific performance of the contract in action 4541, the very suit which the contract provided, as a consideration for its own existence, should be dismissed (Trans. 305)? Again, if appellant did not have to dismiss action 4541, what did it give for its change of position from plaintiff in a lawsuit seeking to establish ownership of the West Brooklyn, to one of contract fixing its relations toward the property, to save expense and dispose of the controversy?

On p. 35, Appellant's Brief, it is confessed that the suit should be dismissed, viz: "That the agreement was a complete settlement between the parties of all antecedent disputes and the pending suits

were to be dismissed without any further consideration, can not be questioned for the agreement is absolute that they should be dismissed."

In September 1906 the option or conditional contract of sale of the West Brooklyn to the United Verde Copper Company mentioned in the contract of August 27, 1907, was entered into. This was extended from time to time in force to January 1, 1908 (Trans. 301). Pearsall said, "The conversation which I particularly recall with Mr. R. C. Miller was during the last part of the holiday week of 1906, at or near Dewey, Arizona. Mr. Miller said to me that they had given an option to the United Verde on the claim." (Trans. 117). On the 31st day of December, 1906, action 4541 was commenced. Every reason exists for the conclusion that this suit was commenced to stop or prevent the consummation of the sale of the West Brooklyn to the United Verde. The same reason exists for the conclusion that the consideration forcing appellees to make the contract of August 27, 1907, wherein they conceded definite contractual rights to appellant in substitution for the indeterminate rights set out in its original cause of action, was the urgency of the situation necessitating, as between the parties to the sale, that appellees secure the dismissal of the suit affecting the title prior to the actual payment of the purchase price. The contract as it had been extended would expire January 1, 1908. Manifestly, this contract between appellant and appellees was made to free the record for the remainder of the life of the conditional sale contract to the United Verde (Tr. 189). This being so, is not the time of the dismissal of that suit of the very essence of the contract; otherwise its

purpose is lost and the intention of the parties destroyed.

It is pertinent to adopt the quotation found on p. 33 of Appellant's Brief from Pom. Con. p. 462, sec. 390, Whiteman vs. Perkins, 56 Neb. 181, 185:

> "It is now thoroughly established that the intention of the parties must govern; and if the intention clearly and unequivocally appears from the contract, by means of some express stipulation, that time shall be essential, the time of completion or performance or of complying with the terms, will be regarded as essential in equity as much as at law."

It is admitted on p. 36 of Appellant's Brief that,

> "The contract created a vested right for the dismissal of all the lawsuits referred to."

This is true, but appellees were denied the benefit of this right by the persistent refusal of appellant to dismiss during the life of appellees' conditional sale contract with the United Verde. It would be hard to imagine a case where the time for performing a given duty could be more of the essence of a contract than the duty of appellant to have dismissed its suit, if not immediately then surely during the unexpired term of appellees' contract with the United Verde.

In the face of the above admission, appellant makes the startling proposition (p. 37 Appellant's Brief) that,

> "Appellees made no proper tender of performance following which appellant would be

obliged to dismiss its suit against Miller et al. according to the terms of the contract."

Thus assuming and asserting the contradictory and false premise that its duty to dismiss depended upon the character of tender of performance by appellees. The truth is made plain when (p. 40 Appellant's Brief) we read:

> "Whether the tender was, or not, a full compliance with all that defendants were to do under the contract, depends upon whether they were to do any of the things offered to be done by them unless the sale was in fact consummated before January 1, 1908. We think it is clear that unless the sale of the West Brooklyn was consummated defendants would not owe the shares of stock nor the $3,150.00, etc., to plaintiff, and for that reason no tender, without the sale, could be operative."

The closing words of this quotation disclose appellant's real position. However wide its circle of reasoning and however oft repeated, it always comes back to this point, which is, in effect, that in spite of its having itself prevented appellees' consummation of the sale to the United Verde, the failure existed, and it could take advantage of it regardless of equities.

Considering alone the language of the contract, it is nothing short of marvelous that appellant ever should have contended that it did not require the dismissal of its action concerning the West Brooklyn or should have imagined it possible for the Millers to sell the West Brooklyn with that lawsuit hanging over it.

Both the trial court and the Supreme Court of the Territory of Arizona held that this agreement required appellant to dismiss its suit against the Millers on or before January 2, 1908.

If in addition to this, the court should care to examine the record to find whether the purpose of the agreement was to get rid of this litigation, we refer to marginal pages 129 and 134 Transcript, where Pearsall, a truly remarkable witness, says he did not know the United Verde would not buy the claim with the lawsuit pending, yet he felt that the lis pendens of the action would protect the company against anybody, even the United Verde Copper Company. Six months before the contract of August 27th was written, Pearsall had carefully copied appellant's exhibit "N," being a letter written by C. C. and A. V. Miller, in which it was stated that the United Verde will buy if the lawsuit is eliminated (Tr. 241), and Pearsall was urged to dismiss the lawsuit at once or the West Brooklyn would become worthless (Tr. 242). C. C. Miller said, "The only reason that ever induced me to sign this contract was to get Pearsall's case dismissed" (Tr. 189). In October, 1907, Miller asked Pearsall to dismiss the suit, saying that on January 1st the West Brooklyn must go either to the appellant or the United Verde (Tr. 120). Miller wanted the suit dismissed in order to make a sale to the United Verde (Tr. 225). Pearsall would not dismiss until the sale was made (Tr. 126). In December, 1907, appellees' counsel demanded, in open court, that the action be dismissed, which was refused by appellant's counsel (Tr. 117). On January 2, 1908, appellees tendered to appellant, in open court, the

money, etc., required to be turned over if sale were made to the United Verde, and asked that the suit be dismissed (Tr. 169, 20 et seq.). The United Verde had gone so far as to advance part of the purchase price to the Millers, hoping thereby to get the title cleared of the litigation in order to complete the purchase (Tr. 236); if the litigation had been dismissed the purchase would have been made (Tr. 227).

This conduct on the part of appellant might appear inexplicable in view of its verified allegation that it entered into the contract of August 27, 1907, because of the great desirability of a sale to the United Verde (Tr. 8); yet Pearsall, who verified this allegation, testified (Tr. 124):

> "I always had the idea that if possible I would like to have that property go to the Brooklyn Mining & Milling Company instead of the United Verde Copper Company."

It was his hope and desire in December, 1907, that the United Verde should not purchase the property (Tr. 124 et seq.). His conduct was framed to realize this hope.

In view of these facts, if they could properly be considered, how it can be claimed, as asserted by appellant in Assignment of Error III (Tr. 291) and in its Brief (p. 13) that,

> "This contract was a reciprocal contract, binding on both parties, and from the date of its execution, August 27, 1907, both of said causes of action were extinguished and dis-

missed, and it was error in the court not to so hold,"

is beyond our comprehension.

Again, in Assignment of Error No. 11, "The judgment of affirmance dismissing appellant's complaint is contrary to equity in this—that appellant from the time of making the contract abandoned its cause of action against appellees and has dismissed the same."

We can not aid this court by pointing out the numerous contradictions appearing from page to page in counsel's brief. The plain truth is that appellant while deceitfully pretending performance, pursued this litigation against appellees in the same manner after the contract of August 27, 1907, that it had before, and with the purpose of defeating the consummation of the sale to the United Verde Copper Company.

This was finally demonstrated beyond all doubt when appellant failed and refused to file its written consent and waiver within thirty days after the date of the decree allowing appellees sixty days within which to consummate a sale or binding contract of sale to the United Verde of the West Brooklyn mining claim, free and clear of all claims and litigation on the part of appellant questioning the title. If it had filed this waiver and appellees had failed to make the sale within ninety days from the date of the decree, it bound appellees to deed the West Brooklyn to appellant. The order of dismissal was only

"That if plaintiff (appellant) shall fail, or refuse, to file herein within said period of thirty days from the date hereof its written consent and waiver as provided herein, then and in such event plaintiff's action herein shall stand dismissed as of this date, and plaintiff shall take nothing thereby."

Thus appellant was given an opportunity to require appellees to consummate a sale to the United Verde, although nearly two years after their conditional contract had expired; but rather than offer a pretense of justice so long delayed, it chose the alternative of having its action dismissed.

PROPOSITION IV.

NEBRASKA DECREE AND DEED.

The Nebraska decree could not control the court in Arizona:

1. Because the suit in Nebraska affected the title of real estate in Arizona, the same title being in question in the court of Arizona at the time the Nebraska action was commenced.

The record shows that the Nebraska action was commenced after the title of the West Brooklyn had been put in issue in Arizona, the Arizona court having jurisdiction over all the parties and the subject matter.

A court before whom an action is pending affecting the title of real property within its jurisdiction, having also jurisdiction of all the parties, should

not be compelled to race, in order to determine the title, with a court of another State before whom the same title is involved by an action later commenced. At the time the suit was commenced in Nebraska, lis pendens had been filed under the action in Arizona, which was notice to all the world.

2. Because the Nebraska court did not have jurisdiction of all the parties and could not settle the whole title.

As the real estate, "the subject matter of the controversy," was situated in Arizona, litigation in respect to its title belonged properly to the courts within Arizona.

Ellinwood v. Marietta Chair Co., 158 U. S. 105, 107.

"Although if all the parties interested in the land were brought personally before a court of another State, its decree would be conclusive upon them and thus in effect determine the title."

Fall v. Eastin, 215 U. S. at page 11.

We fail to find any authority upholding the judgment of a foreign court affecting the title to lands in another State where only a portion of the parties interested in the title are before it. This could but lead to the utmost confusion: as in the present case, if the Nebraska decree should be held to settle the question as against Lasbury and Ada M. Miller, while the courts of Arizona should settle the question as to the title in favor of the other defendants, these conflicting decisions of the courts would but confuse the title.

3. It was sought to have the court in Arizona enforce the Nebraska decree, whereas in order to make it effective, it must be enforced through the instrumentality of the person of the defendants acting under the process of the court rendering the judgment.

It is not claimed that the Nebraska decree or deed could affect the interest of C. C. Miller in the West Brooklyn.

As to the commissioner's deed, it is only necessary to observe that it could have no possible effect as a conveyance, and may be entirely disregarded as an element in this case.

Watts v. Waddle, 6 Pet. 389.

Watkins v. Holman, 16 Pet. 25.

Fall v. Eastin, supra.

There are many other authorities to the same effect. As to the decree itself, the cases are equally conclusive in support of the decisions of the Arizona courts.

The decision of this court in the case of Fall v. Eastin, cited above, affirms the decision of the Supreme Court of Nebraska in the case of Fall v. Fall, 113 N. W. 175. This latter decision is noticeable because rendered by the Supreme Court of the State in which the judgment relied on was rendered. That judgment was rendered by a court of the State of Washington, having full jurisdiction of the parties. It required the defendants to convey land sit-

uated in Nebraska. Upon failure of the defendant to make the required conveyance, a commissioner acting under authority of the decree made the conveyance.

The Supreme Court of Nebraska said:

> "The decree and order acts only upon the person, and if obedience to its mandate be refused, it can only be enforced by the means which have from time immemorial been the weapon of the Court of Chancery * * * *. In order to vest Mrs. Fall with any right, title or interest in and to her husband's lands in Nebraska by virtue of the Washington decree, it was absolutely necessary that the decree be carried into effect by that court by compelling a conveyance from her husband. Neither the decree nor the commissioner's deed conferred any right or title upon her. The decree is inoperative to affect the title to the Nebraska land and is given no binding force or effect so far as the courts of this State are concerned by the provision of the constitution of the United States, with reference to full faith and credit."

Upon appeal to this court the Nebraska decision was confirmed. The contention of the appellant in that case was:

> "That the decree of divorce in the State of Washington which was made in consummation of the equities which arose between the parties under the law of Washington was evidence of her right to the legal title of at least as much weight and value as a contract in writing, reciting the payments of the consideration for the land, would be."

The defendant contended, "That the Washington court had neither power nor jurisdiction to affect in the least, either legally or equitably, lands situated in Nebraska."

It was further claimed by the appellant that the Washington judgment or decree would be conclusive upon the parties in any subsequent proceeding in a court having jurisdiction of the lands for the purpose of quieting the title in the equitable owner. The issue thus raised was as to the extra territorial operation of the decree. The court reviews its earlier decisions and re-affirms the established rule:

> "That when the subject matter of a suit in a court of equity is within another State or country, but the party is in the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant and not upon the subject matter, although the subject matter is referred to in the decree and the defendant is ordered to do or refrain from certain acts toward it; and it is thus ultimately but indirectly affected by the relief granted. In such case the decree is not of itself legal title nor does it transfer the legal title. **It must be executed by the party and obedience is compelled by proceedings in the nature of contempt attachment or sequestration.**"

This decision and the one which it affirms, when carefully considered, are entirely conclusive against appellant herein. No material distinction can be drawn between them and the case at bar. As stated by this court,

"The territorial limitations of the jurisdiction of the courts of a state over property in another state has a limited exception in the jurisdiction of a court of equity, but it is an exception well defined.

The fundamental error of appellant is that it seeks to extend the limits of this exception and to have the Arizona courts enforce the Nebraska decree; that is to say, seeks to use the Arizona courts as an instrumentality with which to enforce that decree, whereas, such a decree is necessarily ineffective where real estate in a foreign jurisdiction is involved, unless it is enforced through the instrumentality of the person of the defendant acting under the process of the court which rendered the judgment.

Other cases sustaining the views just stated are:

Enos v. Hunter, 9 Ill., 214.
Wilson v. Braden (W. Va.), 36 S. E., 367.
Wimer v. Wimer, 82 Va., 890.
Lindley v. O'Reilly, 50 N. J. L., 636.

For the purpose of rendering its decree effective, the court of Nebraska might have prevented the defendants from leaving the jurisdiction of the court pendente lite by a writ of ne exeat.

Enos v. Hunter, 9 Ill., 214.

As far as the decree itself is concerned it may be disregarded by the courts of this territory, since no conveyance was made by Mrs. Miller.

Wilson v. Braden (Supra).

As stated by the New Jersey Court of Appeals in Bullock vs. Bullock, 52 N. J. Eq., page 561; 27 L. R. A., 213, referring to a decree of a New York court in reference to lands in New Jersey,

> "It is a mis-use of terms to call the burden thereby imposed on respondent a personal obligation. At the most the decree and order imposed a duty on him, which duty he owed to the court making them. That court can enforce the duty by its process, but our courts cannot be required to issue such process or make our decrees operate as process. * * * The establishment of the contrary doctrine would result in practically depriving a state of that exclusive control over immovable property therein which has always been accorded."

The iniquity of the doctrine urged by appellant is particularly illustrated in the case at bar. It appears from the record as before stated that long before the Nebraska suit was instituted, all of the owners of the West Brooklyn were before the Arizona court in a suit brought by appellant concerning the title of the West Brooklyn. The Nebraska judgment is clearly unsupported by the decision of the court for the particular reason that the court found that the United Verde would have bought the West Brooklyn if the appellant had complied with its contract. (Trans. 75).

It would be a remarkable thing if one of our courts having a controversy pending before it concerning the title to real estate situate within its jurisdiction should be required to determine that controversy in accordance with an obviously erroneous judgment of a court of the State of Nebraska

rendered in a proceeding instituted after the proceedings in Arizona, and which the Nebraska court never took the pains to carry into effect according to its terms.

The decision of the Nebraska court stands here fully satisfied and discharged. The penalty imposed by it for a failure on the part of the defendants to make the required conveyance has been satisfied and the ineffective commissioner's deed accepted by appellant in satisfaction of the judgment. Having now found that this deed is worthless, appellant seeks to have the Arizona court do what it failed to have done by the proper court and asks this court to use its decree as process in aid of the Nebraska court.

4. The stipulation of December 22nd, 1908, estopped appellant from pleading the Nebraska Decree, or offering either it or the Commissioner's Deed thereunder in evidence.

When this stipulation was made appellant was facing a trial the next day in the Arizona Court. By the stipulation that any judgment which might be rendered in the Nebraska Court should not be pleaded it obtained the continuance whereby it was enabled to force the case to trial in Nebraska before the trial in Arizona. At this point a natural mental query arises as to why appellant sought to run away from a trial in the Arizona Court having jurisdiction of the subject matter and of all of the parties necessary to a complete determination of all the issues to appear before the Nebraska Court and prosecute the same action wherein no jurisdic-

tion could be obtained over the subject matter and at best personal jurisdiction of only a part of the defendants.

Appellant seeks to justify its pleading of this Decree by the claim that when the stipulation was made the title to the West Brooklyn was not involved in the action. This assertion is absurd. The very purpose of the action was to compel appellees to convey the title over to appellant, which was recognized by the Contract of August 27th, 1907, to be in appellees.

No question of law or fact is raised in this case of sufficient dignity to warrant the voluminous record presented. We feel that we have noticed unnecessarily many matters, but we readily submit the case, confident that upon examination of it, the judgment of Supreme Court of Arizona will be affirmed.

Respectfully submitted,

T. G. NORRIS,

Attorney for Appellees.

JOHN M. ROSS,
REESE M. LING,
E. J. MITCHELL,
Of Counsel.

BROOKLYN MINING AND MILLING COMPANY *v.* MILLER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 144. Argued January 23, 24, 1913.—Decided February 3, 1913.

Suit for specific performance dismissed by the courts below for failure of the vendors to comply with the terms of the agreement and judgment affirmed by this court.

The court below properly held appellant to an agreement made in open court as consideration for a continuance that no judgment that might meanwhile be obtained in another State on the same cause of action should be pleaded.

13 Arizona, 217, affirmed.

The facts are stated in the opinion.

Mr. F. S. Howell, with whom *Mr. John J. Hawkins*, *Mr. Thos. C. Job* and *Mr. A. W. Jefferis* were on the brief, for appellant:

Under the issues presented, and the findings of both lower courts that no sale had been consummated of the West Brooklyn claim to the United Verde Copper Company by defendants prior to January 1, 1908, the plaintiff was entitled to specific performance of the contract in suit, without regard to whether it prevented such consummation or not. *Beardsley* v. *Beardsley*, 138 U. S. 261; *Columbia Nat. Bk.* v. *Ger. Nat. Bk.* (Neb.), 77 N. W. Rep. 346; *Keenan* v. *Sic.* (Neb.), 136 N. W. Rep. 841; 2 Kent's Comm. 468; *Micks* v. *Stevenson* (Ind.), 51 N. E. Rep. 492, 493; *Phillip Schneider Brewing Co.* v. *Am. Ice Mach. Co.*, 77 Fed. Rep. 138, 142-144.

Appellant (plaintiff) was guilty of no default, under the terms of the contract set up in its complaint, which would warrant the lower courts in refusing it a decree by way of specific performance ordering a conveyance to it of the West Brooklyn and other mining claims mentioned in its complaint, and the refusal of such relief and the dismissal of plaintiff's (appellant's) complaint was reversible error.

The formal dismissal of the complaint in the case referred to in the contract, the case of the *Brooklyn Company* v. *Miller*, was not a condition precedent to be performed before the consummation of a sale of the "West Brooklyn" claim to the United Verde. If it is to be maintained that the contract itself did not operate to dismiss the case, appellant could formally dismiss at any time before decree for specific enforcement. *King* v. *Gsantner*, 23 Nebraska, 797; Pom. Con., p. 462, § 390; *Seaver* v. *Hall*, 50 Nebraska, 878, 882; Story on Eq. Jur. 777; *Whiteman* v. *Perkins*, 56 Nebraska, 181, 185.

Defendants (appellees) made no proper tender of per-

formance following which plaintiff (appellant) would be obliged to dismiss its suit against Miller *et al.* according to the terms of the contract. *Blight* v. *Schneck*, 10 Pa. St. 285; *Fred* v. *Fred*, 50 Atl. Rep. 776; *Fitch* v. *Bunch*, 30 California, 208–212; *Great Western Tel. Co.* v. *Lowenthal*, 154 Illinois, 261; *MacDonald* v. *Huff*, 77 California, 279; *Tharaldson* v. *Evereth*, 87 Minnesota, 168; *Wittenbrock* v. *Cass*, 110 California, 1.

The undisputed testimony and admissions of appellees (defendants) conclusively show that the failure of appellant to dismiss the suit mentioned in the contract sued on had absolutely nothing to do with and did not cause the failure of appellees to perform the condition precedent of a sale of the West Brooklyn to the United Verde Copper Company. *Halsell* v. *Renfrow*, 202 U. S. 287; *Davis* v. *Williams*, 54 L. R. A. 749; *So. Pine Lumber Co.* v. *Ward*, 208 U. S. 126; *Ward* v. *Sherman*, 192 U. S. 168.

The defendants having taken the position, before litigation was started to compel performance, that the West Brooklyn had in fact been sold to the United Verde Copper Company on or before January 1, 1908, cannot, after suit, change front and assert that a failure to sell was for the fault of plaintiff. *Columbia Nat. Bk.* v. *Ger. Nat. Bk.* (Neb.), 77 N. W. Rep. 346.

The court erred in refusing to give effect to the Nebraska decree, for the reason that it constituted an adjudication of the rights of the plaintiff and certain of the parties defendant by a court of competent jurisdiction, and was therefore conclusive in this case as to such rights and parties as were involved therein. *Bigelow* v. *Old Dominion Copper Min. & Smelt. Co.*, 225 U. S. 111; *Butterfield* v. *Nogales Copper Co.*, 80 Pac. Rep. 345; *Deposit Bank* v. *Frankfort*, 191 U. S. 499; *Estil* v. *Embry*, 112 Fed. Rep. 882; *Fayerweather* v. *Ritch*, 195 U. S. 276; *Harris* v. *Balk*, 198 U. S. 215; *Hilton* v. *Guyot*, 159 U. S. 113; *Heinze* v. *Butte Min. Co.*, 129 Fed. Rep. 274; *The J. R. Langdon*, 163

Fed. Rep. 472; *So. Pac. Ry. Co.* v. *United States*, 168 U. S. 1; *Niles* v. *Lee* (Mich.), 135 N. W. Rep. 274; *No. Pac. Co.* v. *Slaght*, 205 U. S. 122.

Mr. T. G. Norris, with whom *Mr. John M. Ross*, *Mr. Reese M. Ling* and *Mr. E. J. Mitchell* were on the brief, for appellees:

The findings of the District Court adopted by the Supreme Court of the Territory in its judgment of affirmance brought here as a statement of facts in the nature of a special verdict, present the sole question for determination, apart from exceptions duly taken to rulings on the admission or rejection of evidence—do the findings of fact support the judgment? *Stringfellow* v. *Cain*, 99 U. S. 610; *Neslin* v. *Wells Fargo Co.*, 104 U. S. 428; *Eilers* v. *Boatman et al.*, 111 U. S. 356; *Idaho & Oregon Land Imp. Co.* v. *Bradbury*, 132 U. S. 509; *Mammoth Mining Co.* v. *Salt Lake Machine Co.*, 151 U. S. 450; *Haws* v. *Victoria Copper Min. Co.*, 160 U. S. 303; *Gildersleeve* v. *New Mexico Min. Co.*, 161 U. S. 573; *Bear Lake & River Water Works & Irr. Co.* v. *Garland*, 164 U. S. 18; *Harrison* v. *Perea*, 168 U. S. 323.

The contract of August 27, 1907, was in the alternative. Appellant had no right to a choice of its alternatives unless appellees should fail without any fault of appellant. When by its own wrong appellant brought about the condition complained of, it was properly denied specific performance.

Appellant's default in failing and refusing to dismiss action 4541 before January 1, 1908, and its tenacious maintenance of the suit as a pending action with its consequences, was ample and sufficient reason for the court's refusing decree of specific performance. *Whiteman* v. *Perkins*, 56 Nebraska, 181, 185.

The Nebraska decree could not control the court in Arizona. *Ellinwood* v. *Marietta Chair Co.*, 158 U. S. 105,

107; *Fall* v. *Eastin*, 215 U. S. 11; *Watts* v. *Waddle*, 6 Pet. 389; *Watkins* v. *Holman*, 16 Pet. 25; *Fall* v. *Fall*, 113 N. W. Rep. 175; *Enos* v. *Hunter*, 9 Illinois, 214; *Wilson* v. *Braden*, 36 S. E. Rep. 367; *Wimer* v. *Wimer*, 82 Virginia, 890; *Lindley* v. *O'Reilly*, 50 N. J. L. 636; *Bullock* v. *Bullock*, 52 N. J. Eq. 561.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the appellant for the specific performance of a contract made between it and C. C. Miller, A. V. Miller, now deceased, and G. B. Lasbury, hereafter called the vendors, for the sale by the latter parties, on certain conditions and terms, of 175,000 shares of stock in the appellant, or in the alternative of all their interest in the West Brooklyn and certain other mining claims. The bill alleges the failure of the condition referred to and seeks a conveyance of the interest in the mining claims and an account. It was dismissed by the court below and the plaintiff appealed.

The facts found, abridged, are these. The vendors owned the mining claims and had given an option to purchase the West Brooklyn claim and another not concerned here to the United Verde Copper Company, which was extended and kept in force up to January 1, 1908. In 1906, a stockholder in the appellant had begun a suit on behalf of himself and others, afterwards amended so as to make the appellant plaintiff, to have the Millers and Lasbury, also stockholders, declared trustees for the appellant of the mining claim now in question. Miller, on the other hand, had sued the appellants for work done upon the Brooklyn claim. By way of compromise the present contract was made. It recited the two suits and the conditional sale of the West Brooklyn claim to the United Verde Copper Company and provided in consideration of the dismissal and settlement of the foregoing

causes of action that if the sale to the United Verde Company was consummated by January 1, 1908, the above mentioned transfer of stock should be made, &c., but that if for any reason the sale should not be consummated then the conveyance now sought for should take place.*

* The contract in full is as follows:

"Whereas, an action is now pending in the District Court of Yavapai County, Arizona, entitled *Brooklyn Mining & Milling Company et al.* v. *Charles C. Miller, Alonzo V. Miller and George B. Lasbury*, which action relates to the title of the West Brooklyn, East Brooklyn and South Brooklyn Mining Claims located in said county and Territory, and relates to an accounting for ores and minerals taken therefrom, and

"Whereas, The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury have made a conditional sale of the above named West Brooklyn Mining claim for the sum of ten thousand dollars to the United Verde Copper Company, and

"Whereas, an action is pending in the District Court of Yavapai County, Arizona, entitled *Charles C. Miller* v. *Brooklyn Mining & Milling Company* for several thousand dollars claimed to be due and owing to the said Charles C. Miller for services performed by him and Alonzo V. Miller for the said Brooklyn Mining & Milling Company, and

"Whereas, It is the desire of the parties connected with the foregoing causes of action to settle same, and to adjust the matters of difference between the parties in connection therewith;

"Therefore, In consideration of the dismissal and settlement of the foregoing causes of action it is hereby stipulated and agreed by and between the Brooklyn Mining & Milling Company and Charles C. Miller, Alonzo V. Miller and George B. Lasbury that if the sale of the West Brooklyn Mining claim to the United Verde Copper Company is consummated on or before the first day of January, 1908, the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to transfer and deliver to the said Brooklyn Mining & Milling Company one hundred seventy-five thousand shares (175,000) of stock in said Brooklyn Mining & Milling Company, free and clear of all liens or incumbrance whatsoever; it being understood that said transfer of stock is to include all of the holdings of the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury in the Brooklyn Mining & Milling Company, and the said parties are to receive therefor the sum of 3 (Three) cents per share for said stock; and in addition thereto Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to pay to the Brooklyn Mining & Milling Company the sum of eight thousand, five hundred

The suit by Miller was dismissed and a dismissal of the company's action was requested, but it was declined. Then on January 2, 1908, the vendors, alleging consummation of the contract with the United Verde Company, tendered performance, which was declined on the ground

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dollars ($8,500.00) out of the proceeds derived from the sale of the said West Brooklyn mining claim; in addition thereto the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey all of their right, title and interest in and to the East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and said transfer shall contain the warranty that the assessment work has been done for the year 1907 upon the Empress, Midway and North Brooklyn and the said Brooklyn Mining & Milling Company shall pay the said assessment work at its reasonable value. The said Charles C. Miller, Alonzo V. Miller and George B. Lasbury agree to do the assessment work for the year 1907, on the East and South Brooklyn mining claims, and said assessment work so to be performed is to be paid for by the Brooklyn Mining & Milling Company at its reasonable value. It is further stipulated and agreed by and between the parties hereto that if for any reason the sale of the West Brooklyn claim to the United Verde Copper Company by the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury shall not be consummated on or before the first day of January, 1908, then the said Charles C. Miller, Alonzo V. Miller and George B. Lasbury are to convey to the Brooklyn Mining & Milling Company all of their right, title and interest in and to the West Brooklyn, East Brooklyn, South Brooklyn, North Brooklyn, Empress and Midway mining claims, and the assessment work on the North Brooklyn, Empress and Midway claims for the year 1907 is to be paid by the said Brooklyn Mining Company at its fair and reasonable value.

"It is understood by and between the parties hereto that the foregoing does not concede or admit any of the allegations contained in the pleadings of said causes of action, but the agreement is entered into for the purpose of adjusting the matters of difference between said parties and avoiding further costs and expenses to the parties hereto.

"In Witness Whereof, We have hereunto set our hands this 27th day of August, A. D. 1907.

"C. C. Miller.
"A. V. Miller.
"G. B. Lasbury.
"Brooklyn Mining & Milling Company.
"By Chas. W. Pearsall, *President*."

that it did not comply with the terms of the present agreement, and there was a second refusal to dismiss the company's suit. On February 15, however, it did dismiss that suit and ten minutes later began the present one. This was tried in March, 1909, and the court found that the sale to the United Verde Company had not been consummated and that the failure was caused by the refusal of the plaintiff to dismiss its former above mentioned suit, which, it will be remembered, impeached the title of the vendors. (The vendors were not estopped by earlier having alleged consummation.) The court, however, instead of dismissing the bill outright made an alternative decree that it be dismissed if the plaintiff did not assent within thirty days to certain terms looking to a carrying out of the sale to the United Verde Company. The plaintiff refused its assent and the Supreme Court, accepting the finding of the court below, affirmed the dismissal of the bill. This disposes of the case except in one particular to be mentioned. *Harrison v. Penn*, 193 U. S. 211, 223.

On January 28, 1908, the appellant brought a suit in Nebraska for specific performance of the same agreement now sued upon here, and on February 8, 1909, it was decided that the vendors must convey their interest in the West Brooklyn claim, as against John M. Miller, grantee of A. V. Miller, and Lashley, the only parties served, and a master appointed by the court executed a conveyance accordingly. The appellant sought to avail itself of this decree and conveyance. But on December 22, 1908, it was agreed in open court in consideration of the defendants allowing a continuance of the present Arizona case that no judgment that might be obtained in Nebraska should be pleaded. The court properly held the appellant to its agreement. There was a cross complaint by the appellees in the answer to which the decree and conveyance were pleaded, but the Supreme Court, after refer-

ring to *Fall* v. *Eastin*, 215 U. S. 1, disposed of the matter by noticing that no relief was given on the cross complaint and that specific performance was denied on other grounds.

Judgment affirmed.